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UNITED STATES REPORTS

VOLUME 335

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1947

AND

OCTOBER TERM, 1948

OPINIONS OF JUNE 21, 1948 (END OF 1947 TERM)
DECISIONS FROM BEGINNING OF 1948 TERM THROUGH (IN PART)
JANUARY 17, 1949

WALTER WYATT
REPORTER

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ERRATA.

1. 279 U. S. 151, ¶ 1, line 11, "income" should be "estate".

2. 304 U. S. 153, last ¶ of footnote, line 5, "484" should be "284".

3. 326 U. S. 489, first line of footnote 13, "phase" should be "phrase".

4. 331 U. S. 146, line 19, *"Roy St. Louis"* should be *"Roy St. Lewis"*.

5. 334 U. S. 39, line 21: The citation is to the original order. The modified order (see footnote 2 of the opinion) is reported at 40 F. T. C. 388, 398.

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348-73
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v.335

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

FRED M. VINSON, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.
ROBERT H. JACKSON, Associate Justice.
WILEY RUTLEDGE, Associate Justice.
HAROLD H. BURTON, Associate Justice.

RETIRED

CHARLES EVANS HUGHES, Chief Justice.*

TOM C. CLARK, Attorney General.
PHILIP B. PERLMAN, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.
HELEN NEWMAN, Librarian.

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*Mr. Chief Justice Hughes, who had retired from active service July 1, 1941 (313 U. S. p. III), died at the Wianno Club, Osterville, Massachusetts, on August 27, 1948. Funeral services were conducted at Riverside Church, New York City, on August 31, 1948, and interment was in Woodlawn Cemetery, New York City, on the same day. See *post*, p. v.

74605

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the Acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

For the Second Circuit, ROBERT H. JACKSON, Associate Justice.

For the Third Circuit, HAROLD H. BURTON, Associate Justice.

For the Fourth Circuit, FRED M. VINSON, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, STANLEY REED, Associate Justice.

For the Seventh Circuit, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, WILEY RUTLEDGE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, WILEY RUTLEDGE, Associate Justice.

For the District of Columbia, FRED M. VINSON, Chief Justice.

October 14, 1946.

(For next previous allotment, see 328 U. S. p. IV.)

DEATH OF MR. CHIEF JUSTICE HUGHES.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 4, 1948.

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, MR. JUSTICE RUTLEDGE, and MR. JUSTICE BURTON.

THE CHIEF JUSTICE said:

"I announce with profound regret the death on Friday, August 27, 1948, of Charles Evans Hughes, retired Chief Justice of the United States.

"Seldom does it fall to the lot of any man to render distinguished service in so many fields as did Chief Justice Hughes. He was an eminent lawyer, Governor of the State of New York, Associate Justice of the Supreme Court of the United States, nominee of his party for the Presidency, Secretary of State of the United States, and Chief Justice of the United States—a record unique in our Nation's history. His place is high among the outstanding jurists of the world.

"At an appropriate time, the Court will receive the Resolutions of the Bar in tribute to his memory."

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[1] The opinion of December 20, 1948, in this case was reported at 338 U. S. 197.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1947.

SHAPIRO *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 49. Argued October 23, 1947.—Decided June 21, 1948.

1. In obedience to an administrative subpoena, petitioner produced sales records which he had kept as required by a regulation of the Price Administrator, but claimed constitutional privilege. In a prosecution for violation of the Emergency Price Control Act based on evidence thus produced, he interposed a plea in bar, claiming that under § 202 (g) of the Act, which incorporates by reference the provisions of the Compulsory Testimony Act of 1893, his production of these records gave him immunity from prosecution. *Held:* The plea in bar was properly overruled by the trial court. Pp. 3–36.

2. The language of the Act and its legislative history, viewed against the background of settled judicial construction of the immunity provision, indicate that Congress required records to be kept as a means of enforcing the statute and did not intend to frustrate the use of these records for enforcement action by granting an immunity to individuals compelled to disclose them to the Administrator. Pp. 7–32.

(a) The very language of § 202 (a) discloses that the record-keeping and inspection requirements were designed not merely to "obtain information" for assistance in prescribing regulations or orders under the statute, but also to aid in their enforcement. P. 8.

(b) The legislative history of § 202 indicates that Congress, whose attention was invited by proponents of the Price Control Act to the vital importance of the licensing, record-keeping and inspection provisions in aiding effective enforcement, did not

intend § 202 (g) to proffer a "gratuity to crime" by granting immunity to custodians of non-privileged records. Pp. 8–16.

(c) In view of the previous construction given to the Compulsory Testimony Act of 1893 by this Court in *Heike* v. *United States,* 227 U. S. 131, Congress must have intended the immunity proviso in the Price Control Act to be coterminous with what would otherwise have been the constitutional privilege of petitioner in the case at bar; and since he could assert no valid privilege as to the required records here involved, under the doctrine of *Wilson* v. *United States,* 221 U. S. 361, he was entitled to no immunity under the statute. Pp. 16–20.

(d) The precise wording of § 202 (g) of the Price Control Act indicates that its draftsmen went to some pains to insure that the immunity provided for would be construed by the courts as being so limited. Pp. 20–22.

(e) Since the Price Control Act provided for price regulations enforceable against unincorporated entrepreneurs as well as corporate industry, it cannot be assumed that Congress intended to differentiate *sub silentio,* for purposes of the immunity proviso, between records required to be kept by individuals and those required to be kept by corporations. Pp. 22–24.

(f) Such a construction of the immunity proviso does not render meaningless the phrase "any requirements" in the opening clause of § 202 (g). Pp. 24–29.

(g) The legislative history of the 1893 immunity provision, which was incorporated into the Emergency Price Control Act, clearly discloses that the provision was enacted merely to provide an immunity sufficiently broad to be an adequate substitute for the constitutional privilege, in response to the ruling by this Court in *Counselman* v. *Hitchcock,* 142 U. S. 547. Pp. 28–29.

(h) The canon of avoidance of constitutional doubts does not govern the interpretation of the immunity provision, since its application to that clause would override the settled judicial construction of similar provisions and the legislative history of the Compulsory Testimony Act of 1893, and would frustrate the congressional intent manifested by the legislative history of the Emergency Price Control Act. Pp. 29–35.

3. This construction of § 202 (g) of the Price Control Act raises no serious doubts as to its constitutionality. Pp. 32–34.

(a) The privilege which exists as to private papers cannot be maintained where the records in question were required to be maintained under appropriate regulation, their relevance to the lawful purpose of the OPA is unquestioned, and they record trans-

actions in which the dealer could engage solely by virtue of a license granted under the statute. Pp. 32–35.

(b) The sales record which petitioner was required to keep as a licensee under the Price Control Act was such a record; it was legally obtained by the Administrator pursuant to the Act; and hence it was available as evidence. Pp. 34–35.

159 F. 2d 890, affirmed.

Petitioner was convicted of having made tie-in sales in violation of regulations under the Emergency Price Control Act, notwithstanding a plea in bar claiming immunity from prosecution under § 202 (g). The Circuit Court of Appeals affirmed. 159 F. 2d 890. This Court granted certiorari. 331 U. S. 801. *Affirmed*, p. 36.

Bernard Tomson argued the cause for petitioner. With him on the brief were *Menahem Stim* and *Michael C. Bernstein.*

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Quinn, Philip Elman, Robert S. Erdahl* and *Irving S. Shapiro.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Petitioner was tried on charges of having made tie-in sales in violation of regulations under the Emergency Price Control Act.[1] A plea in bar, claiming immunity from prosecution based on § 202 (g) [2] of the Act, was

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[1] 56 Stat. 23, as amended, 50 U. S. C. App. § 901.

[2] "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege." 50 U. S. C. App. § 922 (g).

The Compulsory Testimony Act of 1893 provides: "No person shall be excused from attending and testifying or from producing

overruled by the trial judge; judgment of conviction followed and was affirmed on appeal. 159 F. 2d 890. A contrary conclusion was reached by the district judge in *United States* v. *Hoffman, post,* p. 77. Because this conflict involves an important question of statutory construction, these cases were brought here and heard together. Additional minor considerations involved in the *Hoffman* case are dealt with in a separate opinion.

The petitioner, a wholesaler of fruit and produce, on September 29, 1944, was served with a subpoena *duces tecum* and *ad testificandum,* issued by the Price Administrator under authority of the Emergency Price Control Act. The subpoena directed petitioner to appear before designated enforcement attorneys of the Office of Price Administration and to produce "all duplicate sales invoices, sales books, ledgers, inventory records, contracts and records relating to the sale of all commodities from September 1, 1944 to September 28, 1944." In compliance with the subpoena, petitioner appeared and, after being sworn, was requested to turn over the subpoenaed records. Petitioner's counsel inquired whether petitioner was being granted immunity "as to any and all matters for information obtained as a result of the investigation and examination of these records." The presiding official stated that the "witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept

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books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena . . . ."

pursuant to MPRs 271 and 426." [3] Petitioner thereupon produced the records, but claimed constitutional privilege.

The plea in bar alleged that the name of the purchaser in the transactions involved in the information appeared in the subpoenaed sales invoices and other similar documents. And it was alleged that the Office of Price Administration had used the name and other unspecified leads obtained from these documents to search out evidence of the violations, which had occurred in the preceding year.

The Circuit Court of Appeals ruled that the records which petitioner was compelled to produce were records required to be kept by a valid regulation under the Price Control Act; that thereby they became public documents, as to which no constitutional privilege against self-incrimination attaches; that accordingly the immunity of § 202 (g) did not extend to the production of these records and the plea in bar was properly overruled by the trial court. 159 F. 2d 890.

It should be observed at the outset that the decision in the instant case turns on the construction of a com-

[3] Section 14 of Maximum Price Regulation 426, 8 Fed. Reg. 9546, 9548–49 (1943) provides:

"*Records.* (a) Every person subject to this regulation shall, so long as the Emergency Price Control Act of 1942, as amended, remains in effect, preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts, or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation.

"(b) Every person subject to this regulation shall keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables after the effective date of this regulation and in addition as precisely as possible, the basis upon which he determined maximum prices for these commodities."

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pulsory testimony-immunity provision which incorporates by reference the Compulsory Testimony Act of 1893. This provision, in conjunction with broad record-keeping requirements, has been included not merely in a temporary wartime measure but also, in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government.[4]

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[4] Some of the statutes which include such provisions, applicable to the records of non-corporate as well as corporate business enterprises, are listed below:

Shipping Act, 1916 [46 U. S. C. §§ 826, 827, 814, 817, 820].
Packers and Stockyards Act, 1921 [7 U. S. C. §§ 221, 222].
Commodity Exchange Act of 1922 [7 U. S. C. §§ 15, 6, 7a].
Perishable Agricultural Commodities Act, 1930 [7 U. S. C. § 499m, 499i].
Communications Act of 1934 [47 U. S. C. §§ 409, 203, 211, 213 (f), 220, 412].
Securities Exchange Act of 1934 [15 U. S. C. §§ 78q, 78u].
Federal Alcohol Administration Act, 1935 [27 U. S. C. §§ 202 (c), 204 (d); 26 U. S. C. § 2857; 15 U. S. C. §§ 49, 50].
Federal Power Act, 1935 [16 U. S. C. §§ 825 (a), 825f (g)].
Industrial Alcohol Act of 1935 [26 U. S. C. §§ 3119, 3121 (c)].
Motor Carrier Act of 1935 [49 U. S. C. §§ 305 (d), 304 (a) (1), 311 (d), 317, 318, 320, 322 (g)].
National Labor Relations Act, 1935 [29 U. S. C. §§ 156, 161].
Social Security Act, 1935 [42 U. S. C. § 405 (a), (d), (e), (f)].
Merchant Marine Act, 1936 [46 U. S. C. §§ 1124, 1211, 1114 (b)].
Bituminous Coal Act of 1937 [15 U. S. C. (1940 ed.) §§ 838, 833 (a), (e), (k), 840 (terminated, as provided in § 849)].
Civil Aeronautics Act of 1938 [49 U. S. C. §§ 644, 483, 487, 492, 622 (e) and (g), 673].
Fair Labor Standards Act of 1938 [29 U. S. C. §§ 209, 211; 15 U. S. C. §§ 49, 50].
Natural Gas Act, 1938 [15 U. S. C. § 717a, g, m].
Railroad Unemployment Insurance Act, 1938 [45 U. S. C. §§ 362 (a), (b), (c), (*l*), 359].
Water Carriers Act of 1940 [49 U. S. C. §§ 916, 906, 913, 917 (d)].
Freight Forwarders Act, 1942 [49 U. S. C. §§ 1017 (a), (b), (d), 1005, 1012, 1021 (d)].

In addition to the Price Control Act, the other major regulatory

It is contended that a broader construction of the scope of the immunity provision than that approved by the Circuit Court of Appeals would be more consistent with the congressional aim, in conferring investigatory powers upon the Administrator, to secure prompt disclosure of books and records of the private enterprises subjected to OPA regulations. In support of this contention, it is urged that the language and legislative history of the Act indicate nothing more than that § 202 was included for the purpose of "obtaining information" and that nothing in that history throws any light upon the scope of the immunity afforded by subsection (g). We cannot agree with these contentions. For, the language of the statute and its legislative history, viewed against the background of settled judicial construction of the immunity provision, indicate that Congress required records to be kept as a means of enforcing the statute and did not intend to frustrate the use of those records for enforcement action by granting an immunity bonus to individuals compelled to disclose their required records to the Administrator.

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statutes enacted in response to the recent wartime exigencies also contain these provisions:

Second War Powers Act [50 U. S. C. App. §§ 633, subsecs. 2 (a) (3), (4)].

Stabilization Act of 1942 [50 U. S. C. App. §§ 967 (b), 962].

War and Defense Contract Acts [50 U. S. C. App. § 1152 (a) (3), (4)].

War Labor Disputes Act [50 U. S. C. App. § 1507 (a) (3), (b)].

Very recent regulatory statutes, whose construction may also be affected or determined by the ruling of the Court in the present case, include:

Atomic Energy Act of 1946 [42 U. S. C. §§ 1812 (a) (3), 1810 (c)].

Labor Management Relations Act of 1947, § 101, subsecs. 11, 6; § 207 (c), 61 Stat. 136, 150, 140, 155.

The very language of § 202 (a) discloses that the record-keeping and inspection requirements were designed not merely to "obtain information" for assistance in prescribing regulations or orders under the statute, but also to aid "in the administration and *enforcement* of this Act and regulations, orders, and price schedules thereunder." [5]

The legislative history of § 202 casts even stronger light on the meaning of the words used in that section. On July 30, 1941, the President of the United States, in a message to Congress, requested price-control legislation conferring effective authority to curb evasion and bootlegging.[6] Two days later the Price Control Bill was introduced in the House by Representative Steagall, and referred to the Committee on Banking and Currency.

As introduced, and as reported out of the Committee on November 7, 1941, the bill included broad investigatory, record-keeping, licensing, and other enforcement powers to be exercised by the Administrator.[7] While it

[5] Italics have been added here and in all other quotations in which they appear, unless otherwise noted.

[6] ". . . the existing authority over prices is indirect and circumscribed and operates through measures which are not appropriate or applicable in all circumstances. It has further been weakened by those who purport to recognize need for price stabilization yet challenge the existence of any effective power. In some cases, moreover, there has been evasion and bootlegging; in other cases the Office of Price Administration and Civilian Supply has been openly defied.

"Faced now with the prospect of inflationary price advances, legislative action can no longer prudently be postponed. Our national safety demands that we take steps at once to extend, clarify, and strengthen the authority of the Government to act in the interest of the general welfare." H. Doc. No. 332, 77th Cong., 1st Sess. 3 (1941).

[7] See 87 Cong. Rec. 9148 (1941) for the precise wording of § 202, which was then numbered § 211.

The full text of § 202 as enacted is as follows:

"(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such informa-

was before the House, Representative Wolcott on November 28, 1941, offered as a substitute for § 201 a series of

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tion as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

"(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

"(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

"(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

"(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

"(f) Witnesses subpenaed under this section shall be paid the same

amendments, one of which authorized the Administrator "to subpena documents and witnesses for the purpose of obtaining information in respect to the establishment of price ceilings, and a review of price ceilings." [8] This amendment was adopted. Thereupon Representative Wolcott moved to strike out as "redundant" the much broader and far more rigorous provisions in the bill (§ 202), which authorized the Administrator to "require the making and keeping of records and other documents and the making of reports," and to "obtain or require the furnishing of such information under oath or affirmation or otherwise, as he deems necessary or proper to assist him in prescribing any regulation or order under this act, and in the administration and enforcement of this act, and regulations and orders thereunder." [9] This amendment too was accepted by the House.[10]

It is significant to note that the Senate Committee on Banking and Currency began its consideration of the

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fees and mileage as are paid witnesses in the district courts of the United States.

"(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

"(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

"(i) Any person subpenaed under this section shall have the right to make a record of his testimony and to be represented by counsel." 56 Stat. 23, 30, as amended by § 105 of the Stabilization Extension Act of 1944, 58 Stat. 632, 637, 50 U. S. C. § 922.

[8] 87 Cong. Rec. at 9232; see also *id.* at 9226.

[9] *Id.* at 9231.

[10] *Id.* at 9233.

bill on December 9, 1941, the day after Congress declared the existence of a state of war between this country and the Imperial Government of Japan. Appearing before the Senate Committee in this wartime setting, the proponents of the original measure requested and secured the restoration of the enforcement powers which the House had stricken.[11] They asserted that a major aspect of the investigatory powers contained in the bill as originally drafted was to enable the Administrator to ferret out violations and enforce the law against the violators.[12] And it was pointed out that in striking down the authority originally given the Administrator in the committee bill to require the maintenance of records, the House had substantially stripped him of his investigatory and enforcement powers,

> "because no investigatory power can be effective without the right to insist upon the maintenance of records. By the simple device of failing to keep records of pertinent transactions, or by destroying or falsifying such records, a person may violate the act with impunity and little fear of detection. Especially is this true in the case of price-control legislation, which operates on many diverse industries and commodities, each industry having its own trade practices and methods of operation.

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[11] As pointed out by the Senate Committee, ". . . in amending the House bill, the committee has sought to strengthen it. That bill, when we were not actually at war, might have sufficed. If the authority granted had proved inadequate, additional powers might have been sought and there might have been time to do so. But the swiftly moving pace of war, with evidences of inflation already apparent, leaves little time for the luxury of experiment. The need for price stability is urgent. . . ." S. Rep. No. 931, 77th Cong., 2d Sess. 3 (Jan. 2, 1942).

[12] *Hearings before the Senate Committee on Banking and Currency on H. R. 5990,* 77th Cong., 1st Sess. 192 (1941). (The reference is contained in a brief filed with the Committee by the General Counsel of the Office of Price Administration.)

"The House bill also deprives the Administrator of the power to require reports and to make inspections and to copy documents. By this deprivation the Administrator's supervision over the operation of the act is rendered most difficult. He has no expeditious way of checking on compliance. He is left without ready power to discover violations.

"It should not be forgotten that the statute to be administered is an emergency statute. To put teeth into the Price Control Act, it is imperative that the Administrator's investigatory powers be strong, clear, and well adapted to the objective. . . ." [13]

Emphasis was placed on the restoration of licensing provisions, which the House had deleted from the Price Control Bill as originally drafted. The General Counsel for the OPA contended that licensing was the backbone of enforcement of price schedules and regulations.[14] The

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[13] *Id.* at 193.

It is apparently conceded that the written statement presented to the Senate Committee by the General Counsel of the OPA in its hearings sets forth the construction that this Court sustains in affirming the judgment of the Circuit Court of Appeals for the Second Circuit in this case. We may accord to the construction expounded during the course of the hearings at least that weight which this Court has in the past given to the contemporaneous interpretation of an administrative agency affected by a statute, especially where it appears that the agency has actively sponsored the particular provisions which it interprets. And we may treat those contemporaneous expressions of opinion as "highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute. As such, they are entitled to serious consideration . . ." *White* v. *Winchester Club*, 315 U. S. 32, 41 (1942). See also *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549 (1940); *Hassett* v. *Welch*, 303 U. S. 303, 310–311 (1938).

[14] *Hearings, supra* note 12, at 181; see also *id.* at 154, 179–80 (oral testimony), 190–200; 88 Cong. Rec. 61, 693–94 (1942); S. Rep. No. 931, 77th Cong., 2d Sess. 8–9, 19 (1942).

World War I prototype of the Price Control Act, the Lever Act, had contained authority for the President to license the distribution of any necessaries whenever deemed essential "in order to carry into effect any of the purposes of this Act . . . ." [15] It was pointed out that "The general licensing regulations prescribed under the Lever Act, applicable to all licensees, required the making of reports (rule 1), the permitting of inspection (rule 2), and the keeping of records (rule 3)." [16] And it was noted that licensing had been employed in connection with the fuel provisions of the Act *"as a method of obtaining information, of insuring universal compliance, and of enforcing refunds of overcharges and the payment of penalty charges to war charities."* [17] By li-

[15] Section 5, 40 Stat. 277 (1917). Although § 4 of the Lever Act, making it unlawful for any person to make any "unjust or unreasonable rate or charge" for handling or dealing in necessaries, was held unconstitutional because of lack of an ascertainable standard of guilt in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921), the validity of the licensing and record-keeping provisions was not challenged.

[16] *Hearings, supra* note 12, at 183; see also *id.* at 154.

[17] *Id.* at 184.

The Report of the Senate Committee, following these hearings, recognized the key importance of licensing provisions for effective enforcement of the statute, noting that the "broad licensing power" which had been given to the Food Administrator under the Lever Act "was extensively and effectively used." The Report specifically referred also to the experience of the Fuel Administration, which at first lacked the power to license, then discovered the need for the power, and after acquiring it, secured "highly effective" enforcement results. The Report concluded that ". . . where there are many sellers, as in retailing, for example, it is impossible to determine who is subject to control, much less enforce price regulations, without licensing. Of these facts industry is fully aware. Licensing provides a simple and direct control over violators . . . ." S. Rep. No. 931, 77th Cong., 2d Sess. 8–9.

Speaking critically of the Conference Report, Representative Gifford, who was a Manager on the part of the House and had refused

censing middlemen, "Violations were readily discovered by examination of the records which each licensee was required to submit." [18]

With this background,[19] Congress restored licensing powers to the Administrator in the Price Control Bill as

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to sign the Report and the Statement by the Managers, described licensing then in practice in Canada as a parallel to the licensing proposed by the amended Bill. He called the attention of the House to the Canadian statement of policy: "These restrictions are not designed to curtail business operations in any way. But by placing every person who in any way handles the commodities named in the order under license, the Board will have the machinery with which to make speedy checks on available stocks and *to police more effectively any price-fixing order which may be instituted.*" 88 Cong. Rec. 672 (1942). (Rep. Gifford quoted the statement from "a compiled brief on the licensing methods;" it appears, together with other data referred to by Rep. Gifford, in the section on licensing methods in the brief presented during the Senate hearings by the General Counsel of the OPA, cited *supra* note 12, at p. 188.)

[18] *Hearings, supra* note 12, at 184.

[19] In asking unanimous consent for the Committee to file its report on the next day, Senator Barkley, the Majority Leader and a member of the Committee, stated on the floor of the Senate on January 2, 1942, that these "hearings [held before the Senate Committee from December 9–17] have been in print for a week or two." 87 Cong. Rec. 10142. The Senate vote approving the House Bill as amended was not taken until January 10, more than two weeks after the hearings appeared in printed form. 88 Cong. Rec. 242. The House agreed to the Conference Report on January 26. *Id.* at 689. The Senate accepted the Conference Report on January 27. *Id.* at 725. And the Bill was approved and signed by the President on January 30. *Id.* at 911.

It is also of some interest to note the statement, contained in the Senate Report on the Bill, that a subcommittee which had been appointed immediately after the conclusion of the December 9–17 hearings *"extensively revised and strengthened the House bill in the light of the hearings and the onslaught of war."* S. Rep. No. 931, 77th Cong., 2d Sess. 6 (Jan. 2, 1942). We assume that this record of the Senate Committee proceedings merits the same presumption of regularity as the record of a county criminal court. Cf. *Foster* v. *Illinois*, 332 U. S. 134, 138 (1947).

enacted, § 205, 50 U. S. C. App. § 925 (f), and provided for the suspension by court action of the license of any person found to have violated any of the provisions of the license or price schedules or other requirements. Non-retail fruit dealers, including petitioner in the present case, were licensed under § 9a of Maximum Price Regulation No. 426, 8 F. R. 16411 (1943).

It is difficult to believe that Congress, whose attention was invited by the proponents of the Price Control Act to the vital importance of the licensing, record-keeping and inspection provisions in aiding effective enforcement of the Lever Act, could possibly have intended § 202 (g) to proffer a "gratuity to crime" by granting immunity to custodians of non-privileged records. Nor is it easy to conceive that Congress could have intended private privilege to attach to records whose keeping it authorized the Administrator to require on the express supposition that it was thereby inserting "teeth" into the Price Control Act since the Administrator, *by the use of such records,* could readily discover violations, check on compliance, and *prevent violations from being committed "with impunity."*

In conformance with these views, the bill as passed by Congress empowered the Administrator to require the making and keeping of records by all persons subject to the statute, and to compel, by legal process, oral testimony of witnesses and the production of documents deemed necessary in the administration and enforcement of the statute and regulations. It also included the immunity proviso, subsection (g) of § 202, as to which no special attention seems to have been paid in the debates, although it was undoubtedly included, as it had been in other statutes, as a "usual administrative provision," [20] intended to fulfill the purpose customarily fulfilled by such a provision.

[20] See *Joint Hearings on S. 2475 and H. R. 7200* (Fair Labor Standards Act), 75th Cong., 1st Sess. 61 (1937).

The inescapable implications of the legislative history related above concerning the other subsections of § 202 would appear to be that Congress did not intend the scope of the statutory immunity to be so broad as to confer a bonus for the production of information otherwise obtainable.

Moreover, there is a presumption that Congress, in reenacting the immunity provision of the 1893 Act, was aware of the settled judicial construction of the statutory immunity. In adopting the language used in the earlier act, Congress "must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." [21] That judicial construction is made up of the doctrines enunciated by this Court in spelling out the non-privileged status of records validly required by law to be kept, in *Wilson* v. *United States,* 221 U. S. 361 (1911), and the inapplicability of immunity provisions to non-privileged documents, in *Heike* v. *United States,* 227 U. S. 131 (1913).

In the former case, Wilson, the president of a corporation, was required by subpoena to produce the corporate books in his custody before a grand jury. He appeared before the grand jury but refused to deliver up the records on the ground that their contents would tend to incriminate him, and claimed privilege under the Fifth Amendment. On review in this Court of the judgment committing him for contempt, Wilson based his defense in part on the theory that he would have been protected in his constitutional privilege against self-incrimination had he been sworn as a witness, and that the government's failure to permit him to be sworn could not deprive him of such protection.[22] This argument was disposed

[21] *Hecht* v. *Malley,* 265 U. S. 144, 153 (1924); see also *Missouri* v. *Ross,* 299 U. S. 72, 75 (1936); *Sessions* v. *Romadka,* 145 U. S. 29, 42 (1892).

[22] See digest of brief for appellant in *Wilson* v. *United States,* 55 L. Ed. 771, 773 (1911).

of by the Court simply on the ground that a corporate officer has no such constitutional privilege as to corporate records in his possession, even though they contain entries made by himself which disclose his crime. Mr. Justice Hughes, announcing the opinion of the Court, based the decision on the reasoning (which this Court recently cited with approval, in *Davis* v. *United States,* 328 U. S. 582, 589–90 [1946]) that

> "the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. . . . The principle applies not only to public documents in public offices, but also to *records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained.*" [23]

As illustrations of documents meeting this "required records" test, the Court cited with approval state supreme court decisions that business records kept under requirement of law by private individuals in *unincorporated* enterprises were " 'public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public

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[23] *Wilson* v. *United States,* 221 U. S. 361, 380 (1911). Holmes, J., in *Heike* v. *United States,* 227 U. S. 131, 143 (1913), emphasized that the decision in *Wilson* went "upon the absence of constitutional privilege, not upon the ground of statutory immunity in such a case."

inspection.'" [24] The non-corporate records treated as public in those cases concerned such individuals as druggists required by statute to keep a record of all sales of intoxicating liquors.[25] The corporate and non-corpo-

[24] *Wilson, supra* note 23, at 381. In a later decision involving the alleged ability of corporate officers to assert constitutional privilege in relation to records required to be kept under a regulatory statute, Hughes, J., speaking for the Court, further spelled out the implications of the *Wilson* case and of the "required records" doctrine:

". . . the transactions to which the required reports relate are corporate transactions subject to the regulating power of Congress. And, with regard to the keeping of suitable records of corporate administration, and the making of reports of corporate action, where these are ordered by the Commission under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation and cannot claim a personal privilege in hostility to the requirement." *Baltimore & O. R. Co.* v. *I. C. C.*, 221 U. S. 612, 622–23 (1911).

Thus the significant element in determining the absence of constitutional privilege was the fact that the records in question had been validly required to be kept to enable the Commission "properly to perform its duty to enforce the law." *Id.* at 622. The fact that the individuals claiming the privilege were corporate officers was significant only in that the business transactions subject to the Interstate Commerce Act and the records required to be kept were corporate. And, as corporate officers, they were bound by the obligation imposed by the statute upon their corporation to keep the record. In other words, they were deemed custodians of the records for the Interstate Commerce Commission, not merely for the corporation. Had the transactions there regulated, and the records there required, concerned an unincorporated business, Justice Hughes' rationale sustaining the absence of constitutional privilege against self-incrimination would still apply with undiminished force.

This decision was cited with approval in *United States* v. *Darby*, 312 U. S. 100, 125 (1941), in support of the Court's holding that it is constitutional for Congress, as a means of enforcing the valid regulations imposed by the Fair Labor Standards Act, to require an employer to keep records of wages and hours of his employees. See note 42 *infra*.

[25] Other state supreme court decisions, subsequent to the *Wilson* case, similarly treat as non-privileged, records required by statute

rate businesses required by the Price Control Act to keep records embrace a much greater number of enterprises than those similarly regulated by the states and municipalities. But, since it is conceded that the increased scope of regulation under the wartime measure here involved does not render that Act unconstitutional, the "required records" doctrine which this Court approved as applied to non-corporate businessmen in the state cases would appear equally applicable in the case at bar.

In the *Heike* case, this Court, per Holmes, J., laid down a standard for the construction of statutory immunity provisos which clearly requires affirmance of the decision of the circuit court here: ". . . the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a *gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned.*" [26] In view of the clear rationale in *Wilson,* taken together with the ruling in *Heike* as to how statutory immunity provisos should be construed, the conclusion seems inevitable that Congress must have intended the immunity proviso in the Price Control Act to be coterminous with what would otherwise have been the constitutional privilege of petitioner in the case at bar.

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to be kept by such individuals as licensed fish dealers, *Paladini* v. *Superior Court,* 178 Cal. 369, 372–74, 173 P. 588, 590 (1918); junk dealers regulated by municipal ordinance, *St. Louis* v. *Baskovitz,* 273 Mo. 543, 201 S. W. 870 (1918), or by statute, *State* v. *Legora,* 162 Tenn. 122, 127–28, 34 S. W. 2d 1056, 1057–58 (1931), cf. *Rosenthal* v. *New York,* 226 U. S. 260, 268–69 (1912); dealers in raw furs, *State* v. *Stein,* 215 Minn. 308, 9 N. W. 2d 763 (1943); and licensed money lenders, *Financial Aid Corp.* v. *Wallace,* 216 Ind. 114, 117–119, 122–124, 23 N. E. 2d 472, 474, 476 (1939).

[26] *Heike, supra* note 23, at 142.

Since he could assert no valid privilege as to the required records here in question, he was entitled to no immunity under the statute thus viewed.

The traditional rule that re-enactment of a statute creates a presumption of legislative adoption of previous judicial construction may properly be applied here, since the Court in *Heike* regarded the 1903 immunity statute there construed as identical, in policy and in the scope of immunity furnished, with the Compulsory Testimony Act of 1893, which has been re-enacted by incorporation into the Price Control Act.

In addition, scrutiny of the precise wording of § 202 (g) of the latter statute indicates that the draftsmen of that section went to some pains to ensure that the immunity provided for would be construed by the courts as being so limited. The construction adopted in the *Heike* decision was rendered somewhat difficult because neither the Compulsory Testimony Act of 1893 nor the immunity proviso in the 1903 Act made any explicit reference to the constitutional privilege against self-incrimination, with whose scope the Court nonetheless held the immunity to be coterminous. Section 202 (g), on the other hand, follows a pattern set by the Securities Act of 1933 and expressly refers to that privilege, thus apparently seeking to make it doubly certain that the courts would construe the immunity there granted as no broader than the privilege:

> "*No person shall be excused* from complying with any requirements under this section *because of his privilege against self-incrimination,* but the immunity provisions of the Compulsory Testimony Act of Feb. 11, 1893 . . . shall apply with respect to any individual who specifically claims *such privilege.*"

A comparison of the precise wording of § 202 (g) with the wording of immunity provisions contained in earlier

statutes [27] readily suggests one function intended by the drafters of § 202 (g) to be performed by the additional phrases expressly referring to "privilege"—*viz.*, that of underlining the legislative intention of requiring *an exchange* of constitutional privilege for immunity, an intent which the Court had previously thought discernable even in the less obvious terms used by the drafters of the earlier statutes. Thus the immunity provisions of the Compulsory Testimony Act can be relied upon here only if the two prerequisites set forth in § 202 (g) are satisfied: (1) that the person seeking to avail himself of the immunity could actually have been excused, in the absence

[27] See analysis of the earlier provisos in 8 Wigmore, Evidence, 511 n.9 (3d ed. 1940), and in the brief submitted by the Government in *Heike*, a digest of which appears at 227 U. S. 137. Whether the stronger wording in the Price Control Act and other recent enactments be deemed to indicate a "new legislative purpose," as the majority of the Court in *United States* v. *Monia*, 317 U. S. 424 (1943), ruled that it did in connection with a procedural point not involved in the present case—or be deemed nothing more than "a careful rephrasing of a conventional statutory provision," as the dissenters in *Monia, supra* at 446, believed, the more stringent phrasing of the Price Control Act proviso must, in either view, be regarded as strengthening the applicability of the rule of construction of the *Heike* case.

The precise holding in *Monia* was that a witness before an investigatory body need not claim his privilege as a prerequisite to earning immunity under a pre-1933 statute which offered immunity without any reference to the need for making such a claim. The majority considered the *Heike* decision inapplicable to *Monia* because the relevant terms of the immunity proviso involved in the latter case were so plain and so sharply in contrast with the wording of the enactments after 1933, which (including the Price Control Act) expressly require the assertion of the claim, that Congress could not have intended the pre-1933 statute to require a witness to assert his claim. And it was emphasized that, to construe congressional intention otherwise in those circumstances, might well result in entrapment of witnesses as to testimony concededly privileged. We do not perceive such distinguishing factors in the case at bar, and accordingly consider the *Heike* rationale fully applicable here.

of this section, from complying with any of its requirements because of his constitutional privilege against self-incrimination, and (2) that the person specifically claim such privilege. Obviously if prerequisite (1) is not fulfilled, the mere fact that the person specifically claims a non-existent privilege was not intended by Congress to entitle him to the benefit of the immunity. And this is so whether the statute be construed with particular reference to its grammar, its historical genesis, or its rational function.

Petitioner does not deny that the actual existence of a genuine privilege against self-incrimination is an absolute prerequisite for the attainment of immunity under § 202 (g) by a corporate officer who has been compelled by subpoena to produce required records; and that, under the *Heike* ruling, the assertion of a claim to such a privilege in connection with records which are in fact non-privileged is unavailing to secure immunity, where the claimant is a corporate officer. But, while conceding that the statute should be so construed where corporate officials are concerned, the petitioner necessarily attributes to Congress the paradoxical intention of awarding immunity in exchange for a claim of privilege as to records of a claimant engaged in non-corporate business, though his business is similarly subjected to governmental price control, and its required records are, under the *Wilson* rationale, similarly non-privileged.

The implausibility of any such interpretation of congressional intent is highlighted by the unquestioned fact that Congress provided for price regulations enforcible against unincorporated entrepreneurs as well as corporate industry. It is also unquestionable that Congress, to ensure that violations of the statute should not go unpunished, required records to be kept of all relevant buying and selling transactions by all individual and corporate business subject to the statute. If these aspects of con-

gressional intention be conceded, it is most difficult to comprehend why Congress should be assumed to have differentiated *sub silentio,* for purposes of the immunity proviso, between records required to be kept by individuals and records required to be kept by corporations. Such an assumption carries with it the incongruous result that individuals forced to produce records required to be kept for the Administrator's inspection and use in enforcing the price regulations would be given a bonus of immunity if engaged in non-corporate business, thus rendering the records of non-corporate enterprise virtually useless for enforcement purposes,[28] whereas individuals disclosing the very same type of required records but engaged in corporate enterprise would not be given that bonus. In effect, this is to say that Congress intended the immunity proviso to frustrate a major aim of its statutory requirement of record-keeping and record in-

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[28] See Judge Delehant's well-reasoned discussion, in *Bowles* v. *Misle,* 64 F. Supp. 835, 843 (1946), of the "public or semi-public" character of records kept by a non-corporate entrepreneur subject in his business to such governmental regulation: ". . . if the regulating authority may be intercepted altogether at the door of a regulated business in its quest of information touching the observance of the law and applicable regulations, its ministry must be fruitless. And it can be no more effective if, realistically viewed, the administrator's examination may be made only at a bargain which absolves the proprietor of the business from the sanctions, whether civil or criminal, by law provided for such violations of the regulations, and, therefore, of the law as examination may disclose. . . ."

Compare the dictum in *United States* v. *Mulligan,* 268 F. 893 (N. D. N. Y. 1920), that records required to be kept by an unincorporated businessman under the Lever Act were not privileged, and that information contained therein was available for use in criminal prosecutions against the record-keeper himself. Like the Price Control Act, the Lever Act contained a compulsory testimony immunity provision. § 25, 40 Stat. 285. The memorandum filed with the Senate Committee, cited *supra* note 12, at 194, specifically referred to the "well-stated" opinion in the *Mulligan* case.

spection so far as it applies to non-corporate businessmen, but not so far as it applies to corporate officers.[29]

It is contended that to construe the immunity proviso as we have here is to devitalize, if not render meaningless, the phrase "any requirements" [30] which appears in the opening clause of § 202 (g): "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination . . . ." It is urged that, since § 202 includes among its require-

[29] The extreme unlikelihood that such a distinction, not expressly stated anywhere in the Act, was nevertheless intended by Congress becomes even more apparent in the light of express provision in the statute, § 4 (a), making it unlawful for any person subject to the Act, whether in corporate or unincorporated business enterprise, to fail to comply with the record-keeping requirements of § 202 (b), and making it unlawful, § 205 (b), for any such person to make "any statement or entry false in any material respect in any document or report required to be kept or filed" under § 202 (b). Even in the absence of the judicial background highlighted by the rationale of the *Wilson* and *Heike* decisions, it would be difficult to imagine that records properly required to be kept by the Government, for government use in the administration of a regulatory statute, with penalties of fines and imprisonment applicable against any person subject to the statute who fails to keep those records or who falsifies entries in them, could still be regarded by Congress or the public as private records concerning which the recorder may assert a privilege against self-incrimination.

[30] The phrase "any requirements" appears also in the immunity provision of the Atomic Energy Act of 1946, 42 U. S. C. § 1812 (a) (3). There, as in the Price Control Act, some of the requirements referred to would, in the absence of the section, be excusable because of privilege—*e. g.*, compelled oral testimony—while other requirements, including the compulsory production of records which had been kept pursuant to the statute (§ 1810 [c]), would, under the *Wilson* doctrine, have the same non-privileged (and hence non-immunizing) status as the sales record involved in the present case. Compare also the phraseology used in such statutes as the War and Defense Contract Acts, 50 U. S. C. App. § 1152 (a) (3), (4), and Freight Forwarders Act (1942), 49 U. S. C. § 1017 (a). (b), (d).

ments the furnishing of information under oath, the making and keeping of records and reports, the inspection and copying of records and other documents, and the appearing and testifying or producing of documents, the immunity provided must cover compliance with any one of these requirements. The short answer to that contention is that the immunity provided does cover compliance with any of these requirements *as to which a person would have been excused from compliance because of his privilege,* were it not for the statutory grant of immunity *in exchange for such privilege.*[31] The express language of the proviso, as well as its historical background, readily suggests this reasonable interpretation. Even those who oppose this interpretation must and do concede that Congress had no intention of removing the excuse of privilege where the privilege is absent from the outset because the records whose production is ordered and concerning which privilege is asserted are corporate records. If this concession is made, surely logic as well as history requires a similar reading of the proviso in connection with validly required non-corporate records, as to which privilege is similarly absent from the outset.

If the contention advanced against our interpretation be valid, the Court must have erred in its construction of the immunity proviso in the *Heike* case. For the 1893 Act, 49 U. S. C. § 46, which it was in effect construing, provides that, "No person shall be excused

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[31] Compare the paraphrase of § 202 (g) contained in the Committee Reports: ". . . Although no person is *excused from complying with any requirement* of this subsection *because of his privilege against self-incrimination,* the immunity provisions of the Compulsory Testimony Act of February 11, 1893, are made applicable with respect to any individual who specifically claims *such privilege.*" S. Rep. No. 931, 77th Cong., 2d Sess. 21; H. R. Rep. No. 1409, 77th Cong., 1st Sess. 9. (Italics added here, as elsewhere unless otherwise noted.)

from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission . . . for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted . . . for or on account of any transaction . . . concerning which he may testify, or produce evidence, documentary or otherwise . . . ." Thus the immunity part of the 1893 statute extended to *any documentary* as well as oral testimony concerning which there might be a claim of privilege. And included among the documents which the immunity-seeker might be compelled to produce were records maintained by common carriers in compliance with the requirements of the Interstate Commerce Act,[32] and hence obviously within the definition of public records set forth in the *Wilson* and *Heike* decisions. If the reasoning advanced against the interpretation of § 202 (g) we have proposed were valid, then it might equally well be contended that the Court in the *Heike* decision devitalized, if not rendered meaningless the phrase "documentary or otherwise" in the immunity section of the 1893 Act.

Actually, neither the interpretation as applied in the *Heike* decision nor as expounded here renders meaningless any of the words in the immunity provision. In each case, the immunity proviso is set forth in conjunction with record-keeping requirements. And in each case, where the immunity provided concerns documents whose production might otherwise be excused on the ground of

[32] Section 6 of the Interstate Commerce Act of Feb. 4, 1887, c. 104, 24 Stat. 380, required every common carrier subject to the provisions of the statute to file with the Commission copies of its schedules and tariffs of rates, fares, and charges, and of all contracts and agreements between carriers.

privilege, the documents referred to are all writings whose keeping as records has *not* been required by valid statute or regulation. Of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege.[33]

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[33] It is further suggested that the presence of statutory provisions for confidential treatment, in certain limited respects, of information obtained by the Administrator is inconsistent with the views of this opinion. We find no such inconsistency in the presence of §§ 4 (c) and 202 (h), the provisions which specify the types of confidential safeguards intended.

"Section 4 (c) affords protection to those persons required to disclose information to the Administrator by making it unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, *to disclose or to use for his personal benefit, any information obtained under the bill.* Further provision for confidential treatment of such information is found in section 202 (b) [changed in Conference to § 202 (h)]. . . . Section 202 (b) gives further protection to persons furnishing information to the Administrator under the bill by directing the Administrator, upon the request of the party furnishing such information, or if he deems such information confidential, *not to disclose such information unless he deems that the public interest requires such disclosure.*" S. Rep. No. 931, 77th Cong., 2d Sess. 20–21.

This is substantially the same sort of confidential treatment provided for by the Hepburn Act of 1906, 34 Stat. 594, amending the Interstate Commerce Act: "Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, *except in so far as he may be directed by the Commission or by a court or judge thereof,* shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both." 49 U. S. C. § 20 (7) (f). Numerous other statutes have incorporated almost identically worded provisions. See *e. g.,* Motor Carrier Act of 1935, 49 U. S. C. § 322 (d).

In statutes such as these, where Congress validly distinguishes required records from private papers, with respect to the availability

The Court in the *Heike* case was confronted with the further contention that the 1903 immunity statute, which was immediately before it, had been passed when "there was an imperious popular demand that the inside working of the trusts should be investigated, and that the people and Congress cared so much to secure the necessary evidence that they were willing that some guilty persons should escape, as that reward was necessary to the end." [34] In the light of the express statements in the legislative history of the Price Control Act as to the enforcement role of the investigatory powers, such an argument would hardly be tenable in the present case. Yet even in the *Heike* case where such an argument had some elements of plausibility, the Court had no difficulty in rejecting it in favor of the Government's contention that "the statute should be limited as nearly as may be by the boundaries of the constitutional privilege of which it takes the place." [35]

As a final answer, an understanding of the 1893 immunity provision, based on its full historical context, should suffice to explain the limited function contemplated by Congress in incorporating that provision into the 1942 statute. The 1893 provision was enacted merely to provide an immunity sufficiently broad to be an ade-

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of the required documents as evidence in criminal or other proceedings to enforce the statute for whose effectuation they are kept, nothing in logic nor historical practice requires Congress at the same time to treat the records as public in the sense that they be open at all times to scrutiny by the merely curious. See *Coleman* v. *United States*, 153 F. 2d 400, 402–04 (C. C. A. 6, 1946). Congress expressly foreclosed such a result in the Emergency Price Control Act, and this opinion neither requires nor permits it.

[34] *Heike, supra* note 23, at 141.

[35] *Id.* at 141–42. It would appear that the persuasive brief for the Government in this case, prepared with the assistance of eminent counsel, called forth a Holmesian echo.

quate substitute for the constitutional privilege, since previous statutory provision for immunity had been found by the Court in *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892), not to be coextensive with the privilege, thus rendering unconstitutional the statutory requirements for compulsory production of privileged documents and oral testimony.[36]

The suggestion has been advanced that the scope of the immunity intended by Congress should be ascertained, not by reference to the judicial and legislative history considered above, but by reference to the principle expounded in *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298, 307 (1924), of construing a broad grant of statutory authority so as to avoid attributing to Congress "an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law."

It is interesting to note that Congress, in enacting the Price Control Bill, apparently did intend to rely upon the principle of *American Tobacco* in circumstances similar to those in which that principle was originally applied: namely, to insure that the power of inspection or examination would not conflict with the prohibition against unreasonable searches and seizures contained in the Fourth Amendment. Senator Brown, who was chairman of the sub-committee on the Price Control Bill and one of the managers on the part of the Senate

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[36] See *Heike, supra* note 23, at 142; *Brown* v. *Walker,* 161 U. S. 591, 594–5 (1896); *Hale* v. *Henkel,* 201 U. S. 43, 67 (1906). See also the statement made in the House by Representative Wise, of the Committee on Interstate and Foreign Commerce, in presenting the bill which became the basis of the 1893 Compulsory Testimony Act: "The whole scope and effect of the act is simply to meet the decision rendered recently by the Supreme Court in the case known as 'the Councilman [*sic*] case.'" 24 Cong. Rec. 503 (1893).

appointed to confer with the House managers on the Senate amendments, expressly stated it to be the view of the conferees that § 202 (a), which contained broad authorization to the Administrator to "obtain such information as he deems necessary or proper to assist him" in his statutory duties, was intended solely to empower the Administrator to "obtain *relevant* data to enable him properly to discharge his functions, preferably by requiring the furnishing of information under oath or affirmation or otherwise as he may determine. It is not intended, nor is any other provision of the act intended, to confer any power of inspection or examination which might conflict with the fourth amendment of the Constitution of the United States. See opinion of Justice Holmes in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307." [37]

It was the abuse of the subpoena power to obtain irrelevant data in the course of a "fishing expedition" with which the Court was concerned in that case. It is clear that if the Administrator sought to obtain data irrelevant to the effective administration of the statute and if his right of access was challenged on the ground that the evidence sought was "plainly incompetent or irrelevant to any lawful purpose" [38] of the Administrator, that objection could sustain a refusal by the district court to issue a subpoena or other writ to compel inspection. But there is no indication in the legislative history that Congress intended the *American Tobacco* principle of construction to govern the immunity proviso of subsection (g), particularly since the scope of that proviso had been so well demarcated by the courts prior to its 1942 re-enactment. And it is not insignificant that the one rule of construction which this Court has, in the past, directly and

[37] 88 Cong. Rec. 700 (1942).

[38] *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 509 (1943).

expressly applied to the immunity proviso—that "It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned" [39]—was enunciated by Mr. Justice Holmes, who gave no sign of repudiating that principle by his subsequent statements in the *American Tobacco* case.

Even if the evidence of congressional intent contained in the legislative history were less clear-cut and persuasive, and constitutional doubts more serious than they appear to us, we would still be unconvinced as to the applicability of the *American Tobacco* standard to the construction of the immunity proviso in relation to documentary evidence which is clearly and undeniably relevant, and the recording and keeping of which the Administrator has properly required in advance. For, in construing statutory immunities in such circumstances, we must heed the equally well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen. The canon of avoidance of constitutional doubts must, like the "plain meaning" rule, give way where its application would produce a futile result, or an unreasonable result "plainly at variance with the policy of the legislation as a whole." [40] In the present case, not merely does the construction

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[39] *Heike, supra* note 23, at 142.

[40] *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543 (1940); see also *Missouri Pacific R. Co.* v. *Boone*, 270 U. S. 466, 472 (1926).

"A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question." *United States* v. *Sullivan*, 332 U. S. 689, 693 (1948).

put forward by the petitioner frustrate the congressional intent as manifested by the legislative history, but it also shuts out the illumination that emanates from key words and phrases in the section when considered, as above, in the context of the history of the Compulsory Testimony Act of 1893, and the construction that had been placed upon it and similar provisos, prior to its incorporation into the Price Control Act.

There remains for consideration only the question as to whether serious doubts of constitutionality are raised if the Price Control Act is thus construed. This issue was not duly raised by petitioner, and it becomes relevant, if at all, only because such doubts are now said to be present if the immunity proviso is interpreted as set forth above.

It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator. It is not questioned here that Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the licensing and record-keeping requirements of the Price Control Act represent a legitimate exercise of that power.[41] Accordingly, the principle enunciated in the *Wilson* case, and reaffirmed as recently as the *Davis* case, is clearly applicable here:

[41] Cf. *Yakus* v. *United States*, 321 U. S. 414, 422 (1944).

namely, that the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." [42]

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[42] *Davis* v. *United States*, 328 U. S. 582, 589–90 (1946). See also *United States* v. *Darby*, 312 U. S. 100, 125 (1941) ("Since . . . Congress may require production for interstate commerce to conform to those conditions [wages and hours], *it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it.* The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. . . ."); *Arrow Distilleries* v. *Alexander*, 109 F. 2d 397, 404–05 (1940); *Di Santo* v. *United States*, 93 F. 2d 948 (1937). Cf. *Rodgers* v. *United States*, 138 F. 2d 992, 995–96 (1943).

In *Boyd* v. *United States*, 116 U. S. 616 (1886), the Court held unconstitutional, as repugnant to the Fourth and Fifth Amendments, an 1874 revenue statute which required the defendant or claimant, on motion of the Government attorney, to produce in court his private books, invoices and papers, or else the allegations of the Government were to be taken as confessed. The document to which the statute had been applied in that case was an invoice, which the Government, as well as the defendant, treated throughout the trial and appellate proceedings as a private business record. The Government defended the constitutionality of the statute thus applied on the ground that the action was not against the claimants, but was merely a civil action *in rem* for the forfeiture of merchandise, in which action the claimants had voluntarily intervened. It argued that in a forfeiture action, private books and papers produced under compulsion have no higher sanctity than other property, since the provision in the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" applies only to criminal proceedings *in personam*.

In rejecting the Government's contention, the opinion of the majority of the Court proceeded mainly upon a complex interpretation of the Fourth Amendment, taken as intertwined in its purpose and historical origins with the Fifth Amendment. Under that view, "a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit [*i. e.*, a suit for a

Even the dissenting Justices in the *Davis* case conceded that "there is an important difference in the constitutional protection afforded their possessors between papers exclusively private and documents having public aspects," [43] a difference whose essence is that the latter papers, "once they have been legally obtained, are available as evidence." [44] In the case at bar, it cannot be doubted that the sales record which petitioner was required to keep as a licensee under the Price Control Act has "public aspects." Nor can there be any doubt that when it was obtained by the Administrator through the use of a subpoena, as authorized specifically by § 202 (b) of the statute, it was "le-

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penalty or forfeiture] is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." *Id.* at 634–35; see also *id.* at 621 *et seq.* In other words, the majority opinion construed the prohibition of the Fourth Amendment as applying in the foregoing circumstances "to a returnable writ of seizure describing specific documents in the possession of a specific person." 8 Wigmore, Evidence 368 (3d ed. 1940); see *Hale* v. *Henkel*, 201 U. S. 43, 71–72 (1906).

Holding this view of the Fourth Amendment, the majority of the Court nevertheless carefully distinguished the "unreasonable search and seizure" effected by the statute before it from the "search and seizure" which Congress had provided for in revenue acts that required manufacturers to keep certain records, subject to inspection (see, *e. g.*, Act of July 20, 1868, c. 186, §§ 19, 45, 15 Stat. 133, 143, regulating distillers and rectifiers): ". . . the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, *and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. . . . But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. . . .*" *Id.* at 623–24.

[43] *Davis, supra* note 42, at 602.

[44] *Ibid.*

gally obtained" and hence "available as evidence." [45] The record involved in the case at bar was a sales record required to be maintained under an appropriate regulation, its relevance to the lawful purpose of the Administrator is unquestioned, and the transaction which it recorded was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute.[46]

In the view that we have taken of the case, we find it unnecessary to consider the additional contention by the Government that, in any event, no immunity attaches to the production of the books by the petitioner because the

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[45] See dissenting opinion in *Davis, supra* note 42, at 614 n.9. See also *Amato* v. *Porter,* 157 F. 2d 719 (1946); *Coleman* v. *United States,* 153 F. 2d 400 (1946).

[46] See also the rationale set forth in 8 Wigmore, Evidence § 2259c (3d ed. 1940), a section which was cited with approval by the opinion of the Court in *Davis, supra* note 42, at 590:

"The State requires the books to be kept, but it does not require the officer to commit the crime. If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law. The State announced its requirement to keep the books long before there was any crime; so that the entry was made by reason of a command or compulsion which was directed to the class of entries in general, and not to this specific act. The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it. . . . The same reasoning applies to *records required by law to be kept* by a *citizen* not being a public official, *e. g.* a druggist's report of liquor sales, or a pawnbroker's record of pledges. The only difference here is that the duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts. The duty, or compulsion, is directed as before, to the generic class of acts, not to the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty." (Italics as in the original.)

connection between the books and the evidence produced at the trial was too tenuous to justify the claim.

For the foregoing reasons, the judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting.

The Court this day decides that when Congress prescribes for a limited Governmental purpose, enforceable by appropriate sanctions, the form in which some records are to be kept, not by corporations but by private individuals, in what in everyday language is a private and not a Governmental business, Congress thereby takes such records out of the protection of the Constitution against self-incrimination and search and seizure. Decision of constitutional issues is at times unavoidable. But in this case the Court so decides when it is not necessary. The Court makes a drastic break with the past in disregard of the settled principle of constitutional adjudication *not* to pass on a constitutional issue—and here a grave one involving basic civil liberties—if a construction that does no violence to the English language permits its avoidance. This statute clearly permits it.[1] Instead, the Court goes on the assumption that an immunity statute must be equated with the privilege, although only recently the Court attributed to Congress a gratuitous grant of immunity where concededly the Constitution did not require it, under circumstances far less persuasive than the statutory language and the policy underlying it. See *United States* v. *Monia,* 317 U. S. 424.

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[1] "A decision could be made either way without contradicting the express words of the act, or, possibly, even any very clear implication." Holmes, C. J., in *Hooper* v. *Bradford,* 178 Mass. 95, 97.

Instead of respecting "serious doubts of constitutionality" by giving what is at the least an allowable construction to the Price Control Act which legitimately avoids these doubts, the Court goes out of its way to make a far-reaching pronouncement on a provision of the Bill of Rights. In an almost cursory fashion, the Court needlessly decides that all records which Congress may require individuals to keep in the conduct of their affairs, because they fall within some regulatory power of Government, become "public records" and thereby, *ipso facto,* fall outside the protection of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself."

In reaching out for a constitutional adjudication, especially one of such moment, when a statutory solution avoiding it lay ready at hand, the Court has disregarded its constantly professed principle for the proper approach toward congressional legislation. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U. S. 22, 62, quoted by Mr. Justice Brandeis with supporting citations in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 348, n. 8. And see, generally, for duty to avoid constitutional adjudication, *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568 *et seq.*

Departure from a basic canon of constitutional adjudication is singularly uncalled for in a case such as this, where the statute not only permits a construction avoiding constitutional considerations but on fair reading requires it.

In conferring powers of investigation upon the Administrator, Congress designed to secure the promptest dis-

closure of the books and records of the millions of private enterprises subjected to the regulations of the Office of Price Administration. It would contradict that vital aim to attribute to Congress the conflicting purpose of hampering the free flow of knowledge contained in businessmen's books by inviting controversies regarding still undetermined claims of privilege under the Fifth Amendment, in the absence of an expression of such purpose made much more manifest than the broad language of § 202 (g) which conferred immunity for the very purpose of avoiding such controversies.

It is a poor answer to say that if the statute were eventually found to confer immunity only to the extent required for supplying an equivalent for the constitutional privilege, all records would turn out to be unprivileged or would furnish immunity, and in either case refute any excuse for withholding them. Businessmen are not guided by such abstractions. Obedience is not freely given to uncertain laws when they involve such sensitive matters as opening the books of business. And so, businessmen would have had a strong incentive to hold back their records, forcing the Administrator to compel production by judicial process. Apart from the use of opportunities for obstructive tactics that can hardly be circumvented when new legislation is tested, delays inevitable to litigation would dam up the flow of needed information. Congress sought to produce information, not litigation. See *United States* v. *Monia, supra,* at p. 428.

In the *Monia* case the Court considered that the statute, "if interpreted as the Government now desires, may well be a trap for the witness." *Id.* at 430. We need not speculate here as to potential entrapment. The record discloses that the petitioner asked, through his attorney, whether he was "being granted immunity as to any and all matters for information obtained as a result of the investigation and examination of these records." On be-

half of the Price Administrator, the reply was "The witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to MPRs [Maximum Price Regulations] 271 and 426." Petitioner, himself, thereupon specifically claimed immunity under the statute as well as under the Constitution, and stated that under "these conditions" he produced the books and records that the subpoena sought. It seems clear that disclosure was here made, records were produced, on the petitioner's justifiable belief—based upon the advice of counsel and acquiesced in by the presiding official—that he thereby secured statutory immunity and not constitutional litigation.

There is nothing to indicate that in 1942 Congress legislated with a view to litigating the scope of the limitation of the Fifth Amendment upon its powers. To ascertain what Congress meant by § 202 (g) we would do well to begin by carefully attending to what Congress said:

> "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege." 56 Stat. 23, 30, 50 U. S. C. App. § 922 (g).

The text must be put into its context, not merely because one provision of a statute should normally be read in relation to its fellows, but particularly so here because Congress explicitly linked subsection (g) of § 202 to "any requirements under this section." Effective price control depended on unimpeded access to relevant information. To that end, § 202 authorized the Administrator to impose the "requirements" of the section, and those from whom

they were exacted were under duty of compliance by subsection (e), while subsection (g) barred any excuse from compliance by a claim of privilege against self-crimination by the assurance of immunity from prosecution.[2]

[2] The entire § 202 of the Emergency Price Control Act of 1942, as amended, is as follows:

"(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

"(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

"(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

"(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

"(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have juris-

Subsections (a), (b), (c) and (e) impose these four requirements: persons engaged in the vast range of business subject to the Act may be required to (1) make and keep records, (2) make reports and (3) permit the inspection and copying of records and other documents; such persons as well as others may be required to (4) "appear and testify or to appear and produce documents, or both, at any designated place." [3] An unconstrained reading of subsection (g) insured prompt compliance with all these requirements by removing any excuse based on the privilege against self-crimination.

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diction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

"(f) Witnesses subpenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

"(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

"(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

"(i) Any person subpenaed under this section shall have the right to make a record of his testimony and to be represented by counsel." 56 Stat. 23, 30, as amended by § 105 of the Stabilization Extension Act of 1944, 58 Stat. 632, 637, 50 U. S. C. App. § 922.

[3] Technically there is an additional or fifth requirement—to furnish information "under oath or affirmation or otherwise"—but this requirement is really covered by the other four.

Here the Administrator required the petitioner to "keep and make available for examination by the Office of Price Administration . . . records of the same kind as he has customarily kept . . . ." § 14 (b), MPR 426, 8 F. R. 9546, 9549. The Government contends that because the records of petitioner's own business, those that he "customarily kept," were required to be so kept by the Administrator, he was compelled to disclose their contents even though they may have incriminated him, and that he was afforded no immunity under subsection (g) because he was not disclosing what were really his records. Surely this is to devitalize the phrase "any requirements under this section" if not to render it meaningless.

The Court supports this devitalization with the "short answer" that the immunity provided does cover compliance with *any* of these requirements as to which a person would have been excused from compliance because of his constitutional privilege. The short reply is that, bearing in mind the Court's conclusions as to the scope of the constitutional privilege, only the fourth requirement appears to be thus covered. I do not wish to lay too much stress on the Court's singular interpretation of the plural "requirements." Plainly, the Court construes § 202 (g) as according immunity only to oral testimony under oath and to the production of any documents which the Administrator did not have the foresight to require to be kept.[4]

The Court thus construes the words "complying with any requirements under this section" to read "appearing and testifying or producing documents other than those required to be kept pursuant to this section." Construc-

[4] The Administrator required this petitioner to keep "records of the same kind as he has customarily kept." § 14 (b) of Maximum Price Regulation No. 426, 8 Fed. Reg. 9546. As a practical matter, therefore, the statute as construed by the Court provides immunity only for compelled oral testimony.

tion, no doubt, is not a mechanical process and even when most scrupulously pursued by judges may not wholly escape some retrospective infusion so that the line between interpretation and substitution is sometimes thin. But there is a difference between reading what is and rewriting it. The Court here does not adhere to the text but deletes and reshapes it. Such literary freewheeling is hardly justified by the assumption that Congress would have so expressed it if it had given the matter attentive consideration.[5] In the *Monia* case the Court, having concluded that a similar question was present, had no difficulty in answering: "It is not for us to add to the legislation what Congress pretermitted." 317 U. S. at 430.

Both logic and authority, apart from due regard for our limited function, demonstrate the wisdom of respecting the text. The reach of the immunity given by § 202 (g) is spelled out in the incorporated terms of the Compulsory Testimony Act of 1893. These provide that where, as here, documentary evidence is exacted which may tend to incriminate, he who produces it shall not "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . . ." 27 Stat. 443, 49 U. S. C. § 46. There is of course nothing in this provision to support the finespun exegesis which the Court puts upon § 202 (g). The Government admits as much by acknowledging that "the literal language of the Compulsory Testimony Act possibly may be so read" as to support the present claim of immunity. But it urges that nothing

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[5] But cf. Carroll, Through the Looking Glass, c. 6:

" 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

" 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' "

in the "language or legislative history" of § 202 (g) requires a broader immunity than an adjudication of the scope of the constitutional privilege would exact.

The language yields no support for the Government's sophisticated reading adopted by the Court. Nor is there anything in the legislative history to transmute the clear import of § 202 into esoteric significance. So far as it bears upon our problem, the legislative history of the Act merely shows that § 202 in its entirety was included for the purpose of "obtaining information."[6] Nothing in that history throws any light upon the scope of the immunity afforded by subsection (g).[7] What is there in this silence of Congress that speaks so loudly to the Court? What are the "inescapable implications of the legislative history" that compelled its extraordinary reading of this statute? Surely, the fact that the Administrator's authority to require the keeping of records and the making of reports was stricken from the bill on its original passage through the House but was eventually

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[6] See H. R. 5479, 77th Cong., 1st Sess., as introduced on August 1, 1941, in the House of Representatives and referred to the Committee on Banking and Currency, at p. 8; H. R. 5990, 77th Cong., 1st Sess., as reported out by the Committee on November 7, 1941, at p. 12 (at the conclusion of the hearings on H. R. 5479, the Committee directed its chairman to introduce this new bill representing the old bill as amended by the Committee in executive session; see H. R. Rep. 1409, 77th Cong., 1st Sess., p. 3); H. R. Rep. 1409, *supra*, at p. 9; 87 Cong. Rec. 9073, 9231; *id.* at 9232 (Wolcott amendment to strike out all of § 202 because previous amendment of the bill rendered this section for "obtaining information" redundant); *id.* at 9233 (Wolcott amendment adopted by the House); S. Rep. No. 931, 77th Cong., 2d Sess., p. 21 (H. R. 5990, as passed by the House, amended by reinstating § 202 for the purpose of "obtaining information"); and see finally the Conference Report accompanying H. R. 5990, H. R. Rep. 1658, 77th Cong., 2d Sess., pp. 25–26 (agreeing to § 202).

[7] Indeed, the only reference to the immunity provision in the legislative documents, see footnote 6 *supra*, consists merely of practically verbatim repetitions of the provision.

reinserted, merely indicates that Congress finally concluded that obtaining information was necessary for effective price regulation.[8]

But the Court reads into § 202 (g) the meaning that "they" put upon the record-keeping provisions that Congress thus reinserted into the bill. "They," the "general Counsel for the OPA," appeared and testified orally at the Senate Hearings[9] and, in urging restoration of the licensing (§ 205 (f)) and record-keeping provisions, secured permission to file various briefs and documents with the Committee.[10] While there is nothing in the General Counsel's oral testimony that sheds light upon our prob-

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[8] The House originally struck out the entire § 202 because a previously adopted amendment had made the section "redundant." 87 Cong. Rec. 9232–9233. The previously adopted amendment had inserted a § 203 (a) which simply provided that:

"The Administrator and the Board of Administrative Review or any member or commissioner thereof may administer oaths and affirmations, may require by subpena or otherwise the attendance and testimony of witnesses and the production of documents at any designated place. No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 ed., title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege." *Id.* at 9226.

As passed by the House, then, the bill would have authorized the Administrator to require the production of the records here in issue, but there would have been no question of their being "public" records, and petitioner would clearly have been accorded the immunity herein claimed. The House Managers yielded as to the record-keeping requirements and the reinstatement of the entire § 202, but there is no mention in their report of the provisions of subsection (g), let alone any indication that there was any difference intended in the scope of the immunity accorded by the two bills.

[9] Hearings before the Senate Committee on Banking and Currency on H. R. 5990, 77th Cong., 1st Sess., at pp. 68–71, 112–23, 144–60, 174–81, 550–53.

[10] *Id.* at 154, 175, 180–81.

lem, it does appear from one of the exhibits filed by him that the Court has correctly determined the far-reaching construction that *he* had given to provisions which the House had rejected as "redundant." [11] But our task is to determine, as best we can, what Congress meant—not what counsel sponsoring legislation, however disinterestedly, hoped Congress would mean. If counsel's views had been orally expressed to the Committee,[12] the Committee might have given some indication of its views. But even if upon such disclosure of counsel's views the Committee had remained silent, this would hardly have furnished sufficient evidence to transmute the language that Congress actually employed to express its meaning into some other meaning.

To attribute to Congress familiarity with, let alone acceptance of, a construction solely by reason of the fact that our research reveals its presence among the 60,000-word memoranda which the Chairman of the Senate Committee permitted the General Counsel of the O. P. A. to file, is surely to defy the actualities of the legislative process. Is there the slenderest ground for assuming that members of the Committee read counsel's submission now relied upon by the Court? There is not a reference to the contentions of the O. P. A., wholly apart from that brief, in any report of a committee of either House or in any utterance on the floor of either House.[13] The fact

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[11] See footnote 8 *supra*.

[12] Every reference in the Court's opinion to p. 181 *et seq.* of the hearings is to the General Counsel's brief—an exhibit—not to oral testimony.

[13] I do not dispute either (a) that the hearings (including the brief as an *exhibit* thereto) were printed and available before the Senate passed the bill, or (b) that there is a possibility that a curious Senator (but not a Representative) might have read all this fine print. I mean merely to suggest (a) that in view of the times, the typography, and the length of the text, the chances are remote, and (b) that in view of the importance of the issue it is indeed a hazardous matter

of the matter is that the House had passed the measure before the brief, in type smaller than that of the footnotes in this opinion, appeared in a volume of hearings com-

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to attribute positive congressional meaning to such an improbable source. While it may be presumed that the Senate subcommittee revised the House bill "in the light of the hearings," all that means is that they heard what they heard—it does not mean that they read everything they might have read. It would be enough to attribute to a diligent committeeman familiarity with transcribed oral testimony of such volume as that on this bill. But cf. *id.* at 15: "Senator BARKLEY. Mr. Chairman, none of us have read the hearings in the House—or maybe a few of us have"; *id.* at 26: "Senator TAFT. I have not read the House hearings, I am ashamed to say."

On January 26, 1942, Representative Gifford stated on the floor of the House:

"But this licensing business, 'Compulsory loyalty will crack sooner than the genuine kind.' During the last World War it was loyalty by cooperation. They had licensing, yes, on food products and on fuel, but little of anything else. If the licensee was punished, it was only a slap on the wrist. If he would contribute to the Red Cross he was forgiven. I have a compiled brief on the licensing methods that I could go into at length. An hour would be necessary to properly discuss it and to recite the experiences of ours and other nations. Canada now has it. Let me read to you their statement of policy. These restrictions are not designed to curtail business operations in any way. But by placing every person who in any way handles the commodities named in the order under license, the Board will have the machinery with which to make speedy checks on available stocks and to police more effectively any price-fixing order which may be instituted." (88 Cong. Rec. 672.)

To trace knowledge of the O. P. A. brief to a congressional reader by assuming from this statement that Representative Gifford, who opposed the adoption of these provisions of the bill, was such a reader, and from that to attribute to Congress knowledge of what was in an exhibit to a committee hearing, is so attenuated a process of inferential reasoning as to discredit the whole paraphernalia of legislative history. That the Congress itself does not care to be charged with knowledge of all the extraneous matter for which either House has granted leave to print in the Record is apparent from the rules of the Joint Committee on Printing providing that "the same shall be published in the Appendix" and "in 6½-point type." See Cong. Rec.,

prising 560 pages (part of the three volumes of House and Senate Hearings containing 2,865 pages). The Government, in submitting to us the legislative history of the immunity provision with a view to sustaining its claims, did not pretend that the Congress was either aware of the brief or accepted the construction it proffered. The suggestion that members of a congressional committee have read, and presumptively agreed with, the views found in a memorandum allowed to be filed by a witness and printed in appendix form in the hearings on a bill, let alone that both Houses in voting for a measure adopted such views as the gloss upon the language of the Act which it would not otherwise bear, can only be made in a Pickwickian sense. It is hard to believe that even the most conscientious members of the Congress would care to be charged with underwriting views merely because they were expressed in a memorandum filed as was the O. P. A. brief, on which so much reliance is placed in the Court's opinion. If the language of a statute is to be subjected to the esoteric interpretative process that the suggested use of the O. P. A. brief implies, since it is the common practice to allow memoranda to be submitted to a committee of Congress by interests, public and private, often high-minded enough but with their own axes to grind, great encouragement will be given to the temptations of administrative officials and others to provide self-serving "proof" of congressional confirmation for their private views through incorporation of such materials. Hitherto unsuspected opportunities for assuring desired

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Dec. 11, 1947, p. A5039. There is, moreover, little basis for concluding that the Gifford "compiled brief" was the O. P. A. brief—different briefs frequently quote from the same authority. On the contrary, the O. P. A. brief hardly presented the argument that "Compulsory loyalty will crack sooner than the genuine kind," nor did it contain material demonstrating either the narrow scope or the weaknesses of World War I licensing.

glosses upon innocent-looking legislation would thus be afforded.

We agree with the Government that Congress gave the Administrator broad powers for obtaining information as an aid to the administration and enforcement [14] of the Act, and that "The immunity provision of Section 202 (g) was inserted to insure a full exercise of these powers unhampered by the assertion of the privilege against self-incrimination." Certainly. But how does it follow that Congress thereby intended *sub silentio* to effectuate this broad purpose by confining the immunity accorded within the undefined controversial scope of the Fifth Amendment? One would suppose that Congress secured its object, as this Court held in the *Monia* case, by giving immunity and so taking away contentions based on the constitutional privilege.

Plainly, it would have sufficed to dispose of the present controversy by holding that Congress granted immunity by § 202 (g) to persons who produced their own records, as were the records in this case, and not in their possession as custodians of others, even though required to be kept by § 202. To adapt the language of Mr. Justice Holmes, words have been strained by the Court more than they

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[14] Putting the word "enforcement" in § 202 (a) in italics does little to solve our problem of statutory construction—for *enforcement* means enforcement. The word is hardly enervated by the extension of immunity to the person compelled to disclose his books and records. The information thus obtained might well assist the Administrator in the enforcement of the Act against the suppliers of, buyers from, or competitors of the owner of the records. As to his suppliers, the records would of course disclose compliance with maximum price regulations; as to the buyers, many regulations established maximum price on a cost-plus basis and the information obtained would be essential to proof of violation; as to the competitors, many regulations established maximum price for new sellers on the basis of their closest competitors, and here again the information obtained might well be essential to the enforcement of the Act.

should be strained in order to reach a doubtful constitutional question. See *Blodgett* v. *Holden,* 275 U. S. 142, 148.

And so we come to the Court's facile treatment of the grave constitutional question brought into issue by its disposition of the statutory question. In the interest of clarity it is appropriate to note that the basic constitutional question concerns the scope of the Fifth Amendment, not the validity of the Price Control Act. The Court has construed the immunity afforded by § 202 (g) of the Act as co-extensive with the scope of the constitutional privilege against self-incrimination. Thus construed, the subsection is of course valid, since, by hypothesis, it affords a protection as broad as the Fifth Amendment. *Counselman* v. *Hitchcock,* 142 U. S. 547; *Brown* v. *Walker,* 161 U. S. 591. The vice of this construction—and the importance of the point warrants its reiteration—is precisely that it necessitates interpretation of the Constitution instead of avoiding it.[15] And if the precedents mean anything this course will be followed in every future case involving a question of statutory immunity.

The Court hardly finds a problem in disposing of an issue far-reaching in its implications, involving as they do a drastic change in the relations between the individual and the Government as hitherto conceived. The Court treats the problem as though it were almost self-evident that when records are required to be kept for some needs of Government, or to be kept in a particular form, they are legally considered governmental records and may be demanded as instruments of self-crimination.

Ready-made catch-phrases may conceal but do not solve serious constitutional problems. "Too broadly gen-

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[15] Needless to say, the constitutionality of the Fifth Amendment is not raised!

eralized conceptions are a constant source of fallacy." Holmes, J., in *Lorenzo* v. *Wirth,* 170 Mass. 596, 600. Here the fallacy can be traced to the rephrasing of our problem into terms "to which as lawyers the judges have become accustomed," *ibid.;* then, by treating the question as though it were the rephrased issue, the easy answer appears axiomatic and, because familiar, authoritative. Subtle question-begging is nevertheless question-begging. Thus: records required to be kept by law are public records; public records are non-privileged; required records are non-privileged.

If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume.

The Congress began its history with such legislation. Chapter I of the Laws of the First Session of the First Congress—"An Act to regulate the Time and Manner of administering certain Oaths"—contained a provision requiring the maintenance of records by persons administering oaths to State officials. 1 Stat. 23, 24. Chapter V—"An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandise imported into the United States"—contained a provision requiring an importer to produce the original invoice and to make a return concerning the consigned goods with the collector of the port of arrival. 1 Stat. 29, 39–40.

Every Congress since 1789 has added record-keeping and reporting requirements. Indeed, it was the plethora

of such provisions that led President Roosevelt to establish the Central Statistical Board in 1933 and induced the enactment, in 1942, of the Federal Reports Act, 56 Stat. 1078. See, generally, Report of the Central Statistical Board, H. Doc. No. 27, 76th Cong., 1st Sess.; Centralization and Coordination of Federal Statistics—Report to the Committee on Appropriations of the House of Representatives, December 4, 1945, 91 Cong. Rec. A5419. On April 25, 1939, the Central Statistical Board reported that, "Since the end of 1933, the Board has reviewed in advance of dissemination more than 4,600 questionnaires and related forms and plans proposed for use by Federal agencies. The records for the past 2 years show that the Board has received forms from 52 Federal agencies and a number of temporary interdepartmental committees." See Hearings before the House Committee on Expenditures in the Executive Departments on H. R. 5917, 76th Cong., 1st Sess., at p. 32. The Board, on the basis of a comprehensive survey of the financial and other reports and returns made to 88 Federal agencies by private individuals, farms, and business concerns during the fiscal year ending June 30, 1938, informed Congress as follows:

> "Counting both the administrative and the nonadministrative reports and returns, the Board's inquiry revealed that some 49,000,000 of the total during the year were collected in accordance with statutory provisions specifically authorizing or directing the collection of reports of the types called for. Approximately 55,000,000 returns were collected by agencies in connection with their performance of functions which were specifically authorized by statutes, although the statutes did not specify the reports. In such cases the information sought was obviously necessary in carrying out the required functions. Nearly 27,000,000 returns were collected by

Federal agencies on report forms for each of which the legal authority was too general or too indefinite to permit its clear definition. The remaining 5,000,000 returns were made under a variety of types of legal authorities including authorizations implied in appropriations made specifically to support the collection of the reports.

"Somewhat less than half of the returns made to Federal agencies on all forms . . . were mandatory by law, in the sense that a penalty is prescribed in case of failure of the respondent to file a required report. Some of these mandatory returns are very elaborate, and as a consequence over 60 percent of the total number of answers on report forms, other than applications, were in accordance with mandatory requirements." (H. Doc. No. 27, *supra,* at 11–12.)

I do not intend by the above exposition to cast any doubt upon the constitutionality of the record-keeping or reporting provisions of the Emergency Price Control Act or, in general, upon the vast number of similar statutory requirements. Such provisions serve important and often indispensable purposes. But today's decision can hardly fail to hamper those who make and those who execute the laws in securing the information and data necessary for the most effective and intelligent conduct of Government.

The underlying assumption of the Court's opinion is that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs, because those affairs also have aspects of public interest, become "public" records in the sense that they fall outside the constitutional protection of the Fifth Amendment. The validity of such a doctrine lies in the scope of its implications. The claim touches records that may be required to be kept by fed-

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eral regulatory laws, revenue measures, labor and census legislation in the conduct of business which the understanding and feeling of our people still treat as private enterprise, even though its relations to the public may call for governmental regulation, including the duty to keep designated records.

If the records in controversy here are in fact *public,* in the sense of publicly owned, or governmental, records, their non-privileged status follows. See *Davis* v. *United States,* 328 U. S. 582, 594, 602 (dissenting opinion). No one has a private right to keep for his own use the contents of such records. But the notion that whenever Congress requires an individual to keep in a particular form his own books dealing with his own affairs his records cease to be his when he is accused of crime, is indeed startling.

A public record is a public record. If the documents in controversy are "public records" and as such non-privileged in a prosecution under the Price Control Act, why are they not similarly public and non-privileged in any sort of legal action? There is nothing in either the Act or the Court's construction of it to qualify their "public" nature. Is there any maintainable reason why the Fifth Amendment should be a barrier to their utilization in a prosecution under any other law if it is no barrier here? These records were, as a matter of fact, required to be kept (and hence "public") quite apart from this Act. See Int. Rev. Code § 54 (a) and Treas. Reg. 111, § 29.54–1. If an examination of the records of an individual engaged in the processing and sale of essential commodities should disclose non-essential production, for example, why cannot the records be utilized in prosecutions for violations of the priorities or selective service legislation? Cf. *Harris* v. *United States,* 331 U. S. 145; but cf. *Trupiano* v. *United States,* 334 U. S. 699.

Moreover, the Government should be able to enter a man's home to examine or seize such public records, with

or without a search warrant, at any time. If an individual should keep such records in his home, as millions do, instead of in his place of business, why is not his home for some purposes and in the same technical sense, a "public" library? Compare *Davis* v. *United States,* 328 U. S. 582, and *Harris* v. *United States, supra,* with the "well-stated" opinion in *United States* v. *Mulligan,* 268 F. 893; but see *Trupiano* v. *United States, supra.* This is not "a parade of horribles." If a man's records are "public" so as to deprive him of his privilege against self-crimination, their publicness inheres in them for many other situations.

Indeed, if these records are public, I can see no reason why the public should not have the same right that the Government has to peruse, if not to use, them. For, public records are "of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure." *Evanston* v. *Gunn,* 99 U. S. 660, 666. It would seem to follow, therefore, that these public records of persons engaged in what to the common understanding is deemed private enterprise should be generally available for examination and not barred by the plea that the enterprise would thereby cease to be private.

Congress was guilty, perhaps, of no more than curious inconsistency when it provided in § 202 (h) of the Act for the confidential treatment of these "public" records.[16] But the seeming inconsistency generally applies to

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[16] For the text of § 202 (h) see note 2 *supra.* H. R. 5479 as originally introduced (see note 6 *supra*) would have left it to the Administrator to determine whether the information obtained should be deemed confidential. The bill was changed by the House Committee to its final form whereby the person furnishing the information could request confidential treatment so as to give such persons "further protection." H. R. Rep. 1409, 77th Cong., 1st Sess., p. 9. "Further" meant *in addition to* the statutory immunity afforded by § 202 (g)! *Ibid.*

information obtained by the Government pursuant to record-keeping and reporting requirements. See H. Doc. No. 27, *supra,* at pp. 26–28; 56 Stat. 1078, 1079; H. R. Rep. No. 1651, 77th Cong., 2d Sess., at pp. 4–5; ("We [the Bureau of the Census] do not even supply the Department of Justice or anybody else with that information") Hearings before the House Committee on Expenditures in the Executive Departments on H. R. 7590, 74th Cong., 1st Sess., at p. 63.

The fact of the matter, then, is that records required to be kept by law are not necessarily public in any except a word-playing sense. To determine whether such records are truly public records, *i. e.,* are denuded of their essentially private significances, we have to take into account their custody, their subject matter, and the use sought to be made of them.

It is the part of wisdom, particularly for judges, not to be victimized by words. Records may be public records regardless of whether "a statute requires them to be kept," if "they are kept in the discharge of a public duty" either by a public officer or by persons acting under his direction. *Evanston* v. *Gunn, supra.* Chapter I of the first statute passed by Congress, *supra,* is an example of an act requiring a *public* record to be kept.

Records do not become public records, however, merely because they are required to be kept by law. Private records under such circumstances continue to be private records. Chapter V of the Acts of the First Congress, *supra,* is an example of such a *private* record required to be kept by law.

Is there, then, any foundation for the Court's assumption that *all* records required to be kept by law are public and not privileged? Reliance is placed on language in *Wilson* v. *United States,* 221 U. S. 361. The holding in that case has no real bearing on our problem. Wilson, the president of a corporation, in answer to a subpoena

to produce, refused to surrender the corporation's books and records on the ground that their contents would tend to incriminate him. He appealed to this Court from a judgment committing him for contempt. The case was disposed of on the ground that the books were the corporation's and not "his private or personal books," that the "physical custody of incriminating documents does not of itself protect the custodian against their compulsory production," and that, therefore, "the custodian has no privilege to refuse production although their contents tend to criminate him." 221 U. S. at 378, 380, 382. The Court concluded as follows:

> "The only question was whether as against the corporation the books were lawfully required in the administration of justice. When the appellant became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize.
>
> "We have not overlooked the early English decisions to which our attention has been called . . . but these cannot be deemed controlling. The corporate duty, and the relation of the appellant as the officer of the corporation to its discharge, are to be determined by our laws. Nothing more is demanded than that the appellant should perform the obligations pertaining to his custody and should produce the books which he holds in his official capacity in accordance with the requirements of the subpoena. None of his personal papers are subject to inspection under the writ and his action, in refusing to permit the

> examination of the corporate books demanded, fully warranted his commitment for contempt." (221 U. S. at 385–86.)

The *Wilson* case was correctly decided. The Court's holding boiled down to the proposition that "what's not yours is not yours." It gives no sanction for the bold proposition that Congress can legislate private papers in the hands of their owner, and not in the hands of a custodian, out of the protection afforded by the Fifth Amendment. Even if there were language in the *Wilson* opinion in that direction, an observation taken from its context would seem to be scant justification for resolving, and needlessly, "a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen." *Boyd* v. *United States,* 116 U. S. 616, 618.

The conclusion reached today that *all* records required to be kept by law are *public* records cannot lean on the *Wilson* opinion. This is the language relied upon by the Court:

> "The principle [that a *custodian* has no privilege as to the documents in his *custody*] applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained." (221 U. S. at 380.)

But Mr. Justice Hughes, the writer of the *Wilson* opinion, went on to note that "There are abundant illustrations in the decisions" of this principle that a custodian has no privilege as to the documents in his custody just as no one has a privilege as to public or official records because they are not his private papers. He resorted

to these illustrations concerning custodians because the dissenting opinion of Mr. Justice McKenna, while accepting the premise that public records were not privileged, quarreled with the Court's holding as to the absence of a custodian's privilege concerning non-public records, as follows: "As the privilege is a guaranty of personal liberty it should not be qualified by construction and a distinction based on the ownership of the books demanded as evidence is immaterial. Such distinction has not been regarded except in the case of public records, as will be exhibited by a review of the authorities." 221 U. S. at 388.

The illustrations utilized by Mr. Justice Hughes to meet this challenge raised by the dissent stand for the propositions that (a) a custodian has no privilege, and (b) public documents and records are non-privileged, but not at all on any notion that private records required to be kept by law are "public" records. Before analyzing the eleven precedents or illustrations thus employed, it is worthy of note that the illustrations were derived from the Government's brief. It is significant that that brief, by Solicitor General Frederick W. Lehmann, well-known for his learning, contained no reference to the "required records" doctrine. On the contrary the Government cited these cases to support its argument that: "The immunity granted by the Constitution is purely personal." [17]

These are the "illustrations in the decisions":

(1) *Bradshaw* v. *Murphy,* 7 C. & P. 612, where "it was held that a vestry clerk who was called as a witness could not on the ground that it might incriminate himself object to the production of the vestry books kept under the statute, 58 George III, chapter 69, § 2." (221 U. S. at 380.)

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[17] See summary of argument for the United States, 221 U. S. at 366. The Lehmann Brief deserves reading.

Comment.—This is an instance where records were required to be kept by a public officer (for such, in England, was a parish vestry clerk). Clearly the clerk had no privilege as to such records since (1) they were not his, he was merely their custodian, and (2) he was a public officer.

(2) *State* v. *Farnum,* 73 S. C. 165, where it was held that the dispenser of the State Dispensary had to disclose to a legislative committee the official books of that State institution.

Comment.—Under South Carolina law the dispenser was an officer of the State; the books were true public records; he was their custodian.

(3) *State* v. *Donovan,* 10 N. D. 203, where it was held that a register of sales of intoxicating liquor kept by a druggist pursuant to a statute providing that such record "shall be open for the inspection of the public at all reasonable times during business hours, and any person so desiring may take memoranda or copies thereof" was a public record.

Comment.—The State court construed the statute to make the druggist a public officer and, as such, the custodian of the register for the State. The court quoted authority to the effect that the register was "the property of the state, and not of the citizen, and is in no sense a private memorandum." 10 N. D. at 209. Are we to infer from the Court's opinion in this case that the books and records petitioner customarily kept were not his property but that of the United States Government, and that they "shall be open for the inspection of the public at all reasonable times during business hours, and any person so desiring may take memoranda or copies thereof"? *Ibid.* and cf. *Evanston* v. *Gunn, supra.*

(4) *State* v. *Davis,* 108 Mo. 666, where it was held that a druggist had no privilege as to the prescriptions he filled for sales of intoxicating liquor.

Comment.—Here the prescriptions were "required to be kept by law" but they constituted "public" records in the pure *Wilson* sense. The prescriptions belonged to the physicians or their patients, "and the druggist [was] merely their custodian." 108 Mo. at 671.

(5) *State* v. *Davis,* 68 W. Va. 142 (prescription-keeping case virtually identical with *State* v. *Davis,* 108 Mo. 666).

(6) *People* v. *Coombs,* 158 N. Y. 532, where it was held that a coroner had no privilege as to official inquest records, required to be filed with the county clerk, over his contention that they were private records because they were false and had been found in his own office.

Comment.—"The papers were in a public office, in the custody of a clerk who was paid by the city. On their face they were public records and intended to be used as such." 158 N. Y. at 539.

(7) *L. & N. R. Co.* v. *Commonwealth,* 51 S. W. (Ky.) 167, where it was held that a railroad corporation had no privilege as to a tariff sheet.

Comment.—The tariff sheet was "required by law to be publicly posted at the station, and was in fact so posted." 51 S. W. at 167. Petitioner is not a railroad corporation and his records were not "publicly posted."

(8) *State* v. *Smith,* 74 Iowa 580, where it was held that a pharmacist had no privilege as to the monthly reports of liquor sales that he had made to the county auditor pursuant to a statutory reporting requirement.

Comment.—The reports in the auditor's office were "public records of the office, which are open to the inspection of all, and may be used in evidence in all cases between all parties, when competent, to establish any fact in issue for judicial determination." 74 Iowa at 583–84. Petitioner's records were in his possession and were not open for public inspection.

(9) *State* v. *Cummins,* 76 Iowa 133 (same as *State* v. *Smith, supra*).

(10) *People* v. *Henwood,* 123 Mich. 317 (liquor sales reporting requirement held valid).

(11) *Langdon* v. *People,* 133 Ill. 382, held that seizure pursuant to search warrant of official State documents unlawfully in appellant's possession constituted reasonable search—"They were not private papers." 133 Ill. at 398.

In summary of the authorities cited as illustrations of the principle recognized and applied by the Court in the *Wilson* case, then, it should be obvious that they neither stand for the proposition that the fact that private records are required to be kept by statute makes them public records by operation of law, nor did Mr. Justice Hughes misconstrue them in reaching the decision in the *Wilson* case.

Were there any doubt as to the point of the illustrations in the *Wilson* case, surely we could safely permit that doubt to be resolved by the *Wilson* opinion itself. After reviewing the illustrative cases, Mr. Justice Hughes observed:

> "The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection." (221 U. S. 381–82.)

Evidently the dictum in the *Wilson* case and the authorities therein cited need to be bolstered for the use to which they are put in this case. We are told that "Other state supreme court decisions, subsequent to the

Wilson case, similarly treat as non-privileged, records required by statute to be kept." These are the five instances cited:

(1) *Paladini* v. *Superior Court,* 178 Cal. 369, where it was held that the statutory procedure whereby the State Market Director could compel the production of the sales records of licensed fish dealers was valid.

Comment.—The court did not hold that the records were "non-privileged," but disposed of the contention that the statute violated the constitutional privilege against self-incrimination on the ground that "The proceeding before the state market director is not criminal in its nature, and the order compelling the petitioners to produce their books before the state market director was not in violation of the constitutional provision which prohibits a court or officer from requiring a defendant in a criminal case to furnish evidence against himself." 178 Cal. at 373. The court did dispose of the contention that the statute violated the Fourth Amendment of the United States Constitution on the ground that the records were not private. But the records here were public records because, since it was conceded that the fish belonged to the State, "They contain a record of the purchase and sale of the property of the state, by those having a qualified or conditional interest therein." *Ibid.* There is no suggestion in this case that petitioner's records were public records because his fruit and vegetables were the property of the United States Government.

(2) *St. Louis* v. *Baskovitz,* 273 Mo. 543, where a municipal ordinance requiring junk dealers to keep books of registry recording their purchases and providing that the books be open for inspection and examination by the police *or any citizen* was upheld against the contention that it violated the State constitutional provision against unreasonable searches and seizures *for private purposes.*

Comment.—The case was disposed of by the court's interpretation of the words "any citizen" as being limited in meaning to "one whose property has been stolen." 273 Mo. at 576. The records here were "required to be kept by statute," it is true, but the court had no occasion to, and did not, go into the question as to whether the records were "non-privileged."

(3) *State* v. *Legora,* 162 Tenn. 122, where a statute requiring junk dealers to keep a record of their purchases was upheld.

Comment.—A record which "shall at all times be open to the inspection of . . . any person who may desire to see the same," 162 Tenn. at 124, is, of course, a "public" record. *Evanston* v. *Gunn, supra;* cf. *St. Louis* v. *Baskovitz, supra.*

(4) *State* v. *Stein,* 215 Minn. 308, where a statute requiring licensed dealers in raw furs to keep records of their sales and purchases was upheld.

Comment.—The records here were public records for the same reason that the records involved in the *Paladini* case were public records—"the state is the owner, in trust for the people, of all wild animals." 215 Minn. at 311.

(5) *Financial Aid Corporation* v. *Wallace,* 216 Ind. 114, where a statute requiring licensed small loan concerns to keep records and providing for their inspection by the State Department of Financial Institutions was upheld.

Comment.—The court had no occasion to, and did not, go into the question as to whether the records were either "public" or "non-privileged."

It appears to me, therefore, that the authorities give no support to the broad proposition that because records are required to be kept by law they are public records and, hence, non-privileged. Private records do not thus

become "public" in any critical or legally significant sense; they are merely the records of an industry or business regulated by law. Nor does the fact that the Government either may make, or has made, a license a prerequisite for the doing of business make them public in any ordinary use of the term. While Congress may in time of war, or perhaps in circumstances of economic crisis, provide for the licensing of every individual business, surely such licensing requirements do not remove the records of a man's private business from the protection afforded by the Fifth Amendment. Even the exercise of the war power is subject to the Fifth Amendment. See, *e. g., Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 155–56. Just as the licensing of private motor vehicles does not make them public carriers, the licensing of a man's private business, for tax or other purposes, does not under our system, at least so I had supposed, make him a public officer.

Different considerations control where the business of an enterprise is, as it were, the public's. Clearly the records of a business licensed to sell state-owned property are public records. Cf., *e. g., Paladini* v. *Superior Court, supra; State* v. *Stein, supra.* And the records of a public utility, apart from the considerations relevant to corporate enterprise, may similarly be treated as public records. Cf., *e. g., L. & N. R. Co.* v. *Commonwealth, supra; Financial Aid Corporation* v. *Wallace, supra.* This has been extended to the records of "occupations which are *malum in se,* or so closely allied thereto, as to endanger the public health, morals or safety." *St. Louis* v. *Baskovitz, supra,* at p. 554; cf., *e. g., State* v. *Legora, supra; State* v. *Donovan, supra; State* v. *Smith, supra.*

Here the subject matter of petitioner's business was not such as to render it public. Surely, there is nothing inherently dangerous, immoral, or unhealthy about the

sale of fruits and vegetables. Nor was there anything in his possession or control of the records to cast a cloud on his title to them. They were the records that he customarily kept. I find nothing in the Act, or in the Court's construction of the Act, that made him a public officer. He was being administered, not administering. Nor was he in any legitimate sense of the word a "custodian" of the records. I see nothing frivolous in a distinction between the records of an "unincorporated entrepreneur" and those of a corporation. On the contrary, that distinction was decisive of the *Wilson* holding:

> "But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books." (221 U. S. at 382.)

And the Court quoted at length from *Hale* v. *Henkel*, 201 U. S. 43, 74–75:

> "'. . . we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. . . .
>
> "'Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises . . . .'" (221 U. S. at 383.)

The distinction between corporate and individual enterprise is one of the deepest in our constitutional law, as it is for the shapers of public policy.

The phrase "required to be kept by law," then, is not a magic phrase by which the legislature opens the door to inroads upon the Fifth Amendment. Statutory provisions similar to § 202 (b) of this Act, requiring the keeping of records and making them available for official inspection, are constitutional means for effective administration and enforcement.[18] It follows that those charged with the responsibility for such administration and enforcement may compel the disclosure of such records in conformity with the Fourth Amendment. See *Boyd* v. *United States, supra,* at pp. 623–24. But it does not follow that such disclosures are beyond the scope of the protection afforded by the Fifth Amendment. For the compulsory disclosure of a man's "private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Id.* at 632.

The Court in the *Boyd* case was fully cognizant of the sense and significance of the phrase "books required by law to be kept for their inspection." *Id.* at 623–24. Surely the result of that decision, if not the opinion itself, speaks loudly against the claim that merely by virtue of a record-keeping provision the constitutional privilege against self-incrimination becomes inoperative. The document in controversy in the *Boyd* case was historically, and as a matter of fact, much more of a "required record" than the books and records the petitioner here "cus-

[18] See note 14 *supra.*

tomarily kept." If the Court's position today is correct the *Boyd* case was erroneously decided.[19]

[19] The Boyds had contracted to supply plate glass to the Government on a duty-free price basis. They contended that they had fulfilled this contract out of their stock on hand. They had previously secured a free entry of 29 cases of plate glass and claimed that this shipment replaced *in part* the glass that they had furnished the Government; the Government asserted that that shipment contained more than the amount of the glass furnished. After the Boyds had secured a free permit and entry of a second shipment of 35 cases of plate glass, but before delivery to them, the goods were seized and the free permit was revoked. In the proceedings for the forfeiture of the 35 cases, the Government, pursuant to the statutory procedure held unconstitutional by the Court, sought and secured production from the Boyds of the invoice covering the first shipment of the 29 cases. This invoice was a "record required to be kept by statute." The Act of July 31, 1789, required the importer to make an official entry with the collector at the port of arrival and there produce the original invoice to the collector. 1 Stat. 29, 39–40; as amended by the Act of August 4, 1790, 1 Stat. 145, 161–62; as amended by the Act of March 2, 1799, 1 Stat. 627, 655–56 (invoice must be signed by collector; and see form of oath required to accompany invoice); as amended by the Act of April 20, 1818, 3 Stat. 433, 434, 436; as amended by the Act of March 1, 1823, 3 Stat. 729–30 (no entry without invoice unless importer gives bond to secure production of invoice within stated period), 737 (invoice, certified with collector's official seal, conclusive evidence of value of imported goods in any court of the United States); as amended by the Act of August 30, 1842, 5 Stat. 548, 564–65 (collector authorized to examine any importer and to require production of invoices); as amended by the Act of March 3, 1863, 12 Stat. 737–38 (required invoices to be in triplicate and indorsed prior to shipment to this country by a consular officer who "shall deliver to the person producing the same one of said triplicates, to be used in making entry of said goods, wares, or merchandise; shall file another in his office, to be there carefully preserved; and shall, as soon as practicable, transmit the remaining one to the collector of the port of the United States at which it shall be declared to be the intention to make entry of said goods, wares, or merchandise"), 740 (penalty for wilful destruction or concealment of invoices) and (district judge where it appears to his satisfaction that fraud on revenue has been committed or attempted shall authorize collector to seize invoices); as amended

In disregarding the spirit of that decision, the Court's opinion disregards the clarion call of the *Boyd* case: *obsta principiis.* For, while it is easy enough to see this as a petty case and while some may not consider the rule of law today announced to be fraught with unexplored significance for the great problem of reconciling individual freedom with governmental strength, the *Boyd* opinion admonishes against being so lulled. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Id.* at 635.

Violators should be detected, tried, convicted, and punished—but not at the cost of needlessly bringing into question constitutional rights and privileges. While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the

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by the Act of June 30, 1864, 13 Stat. 202, 217–18 (invoice must be made out in the weights and measures of the country from which importation made); as amended by the Act of July 18, 1866, 14 Stat. 178, 187 (seizure of invoices); as amended by the Act of March 2, 1867, 14 Stat. 546, 547 (seizure of invoices); as amended by the Act of June 22, 1874, 18 Stat. 186, 187 (§ 5—seizure of invoices—held unconstitutional in *Boyd* case). For administrative requirements as to form, contents, filing and keeping of invoices, in effect at time of entry involved in *Boyd* case, see General Regulations under the Customs and Navigation Laws (1884) Arts. 314–34; see also Elmes, Customs (1887) c. VII.

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individual were not designed for short-cuts in the administration of criminal justice.

And so I conclude that the Court has misconstrued the Fifth Amendment by narrowing the range and scope of the protection it was intended to afford. The privilege against self-incrimination is, after all, "as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock, supra,* at p. 562. If Congress by the easy device of requiring a man to keep the private papers that he has customarily kept can render such papers "public" and non-privileged, there is little left to either the right of privacy or the constitutional privilege.

Even if there were authority for the temerarious pronouncement in today's opinion, I would insist that such authority was ill-founded and ought not to be followed. There is no such authority. The Court's opinion can gain no strength beyond itself. The persuasiveness of its opinion is not enhanced by the endeavor of the majority of the Court, so needlessly reaching out for a constitutional issue, to rest its ominous inroads upon the Fifth Amendment not on the wisdom of their determination but on blind reliance upon non-persuasive authority.

MR. JUSTICE JACKSON, with whom MR. JUSTICE MURPHY agrees, dissenting.

The protection against compulsory self-incrimination, guaranteed by the Fifth Amendment, is nullified to whatever extent this Court holds that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him. Today's decision introduces a principle of considerable moment. Of course, it strips of protection only business men and their records; but we cannot too often remind ourselves of the tendency of such a principle, once approved, to expand itself in practice "to the limits of its logic." That it has already expanded to cover a vast

area is apparent from the Court's citation of twenty-six federal statutes that present parallels to the situation here under review. It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to. The decision of today, applying this rule not merely to records specially required under the Act but also to records "customarily kept," invites and facilitates that eventuality.

The practice approved today obviously narrows the protections of the Fifth Amendment. We should not attribute to Congress such a purpose or intent unless it used language so mandatory and unmistakable that it left no alternative, and certainly should not base that inference on "legislative history" of such dubious meaning as exists in this case. Congress, if we give its language plain and usual meaning, has guarded the immunity so scrupulously as to raise no constitutional question. But if Congress had overstepped, we should have no hesitation in holding that the Government must lose some cases rather than the people lose their immunities from compulsory self-incrimination. However, in this case, the plain language of Congress requires no such choice. It does require, in my view, that this judgment be reversed.

MR. JUSTICE RUTLEDGE, dissenting.

With reservations to be noted, I agree with the views expressed by MR. JUSTICE JACKSON, and with MR. JUSTICE FRANKFURTER'S conclusions concerning the effect of the immunity provision, § 202 (g) of the Emergency Price Control Act.[1]

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[1] 56 Stat. 23, 30 [§ 202 (g)], as amended, 50 U. S. C. App. § 901, incorporating the provisions of the Compulsory Testimony Act of 1893, 27 Stat. 443, 49 U. S. C. § 46, quoted in the Court's opinion in note 2.

With them I cannot accept the Court's construction of that section which reduces the statutory immunity to the scope of that afforded by the Fifth Amendment's prohibition against compulsory self-incrimination. This Court has not previously so decided.[2] Nor, in my judg-

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[2] Neither *Heike* v. *United States*, 227 U. S. 131, nor *Wilson* v. *United States*, 221 U. S. 361, principally relied upon by the Court, approached such a ruling.

The *Wilson* case dealt only with corporate records, and the claim of a corporate officer having their custody to constitutional immunity against being required to produce them. None were required by law to be kept, in the sense that any federal law required that they be kept and produced for regulatory purposes. The only ruling was that a corporate officer has no personal immunity against producing corporate records, which are of course not his own, and that the corporation has no immunity of its own under the Fifth Amendment's guaranty. The decision is not pertinent to the presently tendered problem.

The *Heike* decision is equally not apropos. The exact ruling was that the evidence, from the production of which the claimed right of immunity, constitutional as well as statutory, arose, "did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that they all were dealings of the same sugar company." 227 U. S. 131, 143. The actual ruling therefore, apart from the fact that a corporate officer claimed immunity in large part for producing corporate records, see *id.*, 142–143, was that the petitioner had not brought himself within the scope of the statutory authorization, namely, because the "transaction, matter or thing" concerning which he had testified had no substantial connection with the matters involved in his prosecution. The decision is authority for nothing more than that the immunity at the most does not attach when the constitutional claim precluded, but said to bring the statute into play, is insubstantial. The dictum stressed in the Court's opinion that the statute "should be construed, *so far as its words fairly allow the construction*, as coterminous with" (P. 142) the constitutional immunity, not only was unnecessary, but as the clause itself emphasized explicitly negatives exact equivalence. (Emphasis added.)

ment, can the present decision be reconciled with the language of the statute or its purpose obvious on its face.

That wording compels testimony and the production of evidence, documentary or otherwise, regardless of any claim of constitutional immunity, whether valid or not.[3] But to avoid the constitutional prohibition and, it would seem clearly, also any delay in securing the information or evidence required, the Act promises immunity "for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . . in obedience to" the subpoena.[4]

The statute thus consists of a command and a promise. In explicit terms the promise is made coextensive with the command. It expressly precludes prosecution, forfeiture or penalty "for or on account of *any* transaction, matter or thing" concerning which evidence is produced in compliance with the subpoena.[5] Compelling testimony and giving immunity "for or on account of any transaction, matter or thing, concerning which he may testify" are very different from compelling it and promising that, when given, the person complying "shall have only the immunity given by the Fifth Amendment and no more." To constrict the statute's wording so drastically is not simply to interpret, it is to rewrite the congressional

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[3] The wording of the Compulsory Testimony Act neither requires nor suggests that the right to the immunity given should turn on the validity or invalidity of the constitutional claim which is precluded. But at the least the Act would seem clearly to cover both valid and substantially doubtful ones.

[4] See the text of the Compulsory Testimony Act of 1893 quoted in note 2 of the Court's opinion.

[5] The express limitation of the immunity to testimony or evidence produced in obedience to the subpoena excludes immunity for volunteered testimony or evidence, *i. e.*, such as is given in excess of the subpoena's requirement. But the terms of the statute purport to exclude no other.

language and, in my view, its purpose. If Congress had intended only so narrow a protection, it could easily have said so without adding words to lead witnesses and others to believe more was given.

It may be, however, notwithstanding the breadth of the promissory terms, that the statutory immunity was not intended to be so broad as to cover situations where the claim of constitutional right precluded is only frivolous or insubstantial or not put forward in good faith.[6] And if, for such a reason, the literal breadth of the wording may be somewhat cut down, restricting the statute's immunity by excluding those situations would neither restrict the effect of the statutory words to that of the Amendment itself nor give them the misleading connotation of the Court's construction. Such a construction would not be departing widely from either the statute's terms or their obvious purpose to give immunity broader than the Amendment's, and would be well within the bounds of statutory interpretation. On the other hand, the Court's reduction of the statutory wording to equivalence in effect with the constitutional immunity, nearly if not quite makes that wording redundant or meaningless; in any event, it goes so far in rewriting the statutory language as to amount to invasion of the legislative function.

Whether one or the other of the two broader views of the statute's effect is accepted, therefore, it is neither necessary nor, I think, reasonable or consistent with the statutory wording and object or with this Court's function as strictly a judicial body to go so far in reconstructing what Congress has done, as I think results from reducing the statutory immunity to equivalence with the constitutional one.

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[6] Cf. *Heike* v. *United States*, 227 U. S. 131. See note 2 *supra*.

Since it is not contended that there was not full compliance with the subpoena in this case, that compliance was excessive in the presently material portions of the evidence or information produced, or that the claim of constitutional immunity precluded was frivolous, insubstantial or not made in good faith, I think the judgment should be reversed by applying the statutory immunity, whether in one or the other of the two forms which may be applied.

In this view I am relieved of the necessity of reaching the constitutional issue resulting from the Court's construction, and I express no opinion upon it except to say that I have substantial doubt of the validity of the Court's conclusion and indicate some of the reasons for this. I have none that Congress itself may require the keeping and production of specified records, with appropriate limitations, in connection with business matters it is entitled to and does regulate. That is true not only of corporate records, *Wilson* v. *United States,* 221 U. S. 361, but also of individual business records under appropriate specification and limitations, as the numerous instances cited in MR. JUSTICE FRANKFURTER'S opinion illustrate.

But I seriously doubt that, consistently with the Fourth Amendment, as well as the prohibition of the Fifth against compulsory self-incrimination, Congress could enact a general law requiring all persons, individual or corporate, engaged in business subject to congressional regulation to produce, either in evidence or for an administrative agency's or official's examination, any and all records, without other limitation, kept in connection with that business. Such a command would approach too closely in effect the kind of general warrant the Fourth Amendment outlawed. That would be even more obviously true, if there were any difference, in case Congress

should delegate to an administrative or executive official the power to impose so broad a prohibition.

The authority here conferred upon the Administrator by the Emergency Price Control Act, in reference to record-keeping and requiring production of records, closely approaches such a command. Congress neither itself specifies the records to be kept and produced upon the Administrator's demand nor limits his power to designate them by any restriction other than that he may require such as "he deems necessary or proper to assist him," § 202 (a), (b), (c), in carrying out his functions of investigation and prescribing regulations under, as well as of administration and enforcement of, the Act. And as the authority to specify records for keeping and production was carried out by the Administrator, the only limitation imposed was that the records should be such as had been "customarily kept." § 14 (b), M. P. R. 426, 8 Fed. Reg. 9546, 9549. Such a restriction is little, if any, less broad than the one concerning which I have indicated doubt that Congress itself could enact consistently with the Fourth Amendment.

The authorization therefore is one which raises serious question whether, by reason of failure to make more definite specification of the records to be kept and produced, the legislation and regulations involved here do not exceed the prohibition of the Fourth Amendment against general warrants and unreasonable searches and seizures. There is a difference, of course, and often a large one, between situations where evidence is searched out and seized without warrant, and others where it is required to be produced under judicial safeguards. But I do not understand that in the latter situation its production can be required under a warrant that amounts to a general one. The Fourth Amendment stands as a barrier to judicial and legislative as well as executive or administrative excesses in this respect.

Although I seriously question whether the sum of the statute, as construed by the Court, the pertinent regulations, and their execution in this case does not go beyond constitutional limitations in the breadth of their inquiry, I express no conclusive opinion concerning this, since for me the statutory immunity applies and is sufficient to require reversal of petitioner's conviction.

UNITED STATES v. HOFFMAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

No. 97. Argued October 23, 1947.—Decided June 21, 1948.

After appellee had produced in an administrative proceeding records kept under a requirement of the Price Administrator's regulations, the Price Administrator petitioned the district court to institute criminal contempt proceedings against him for violating an injunction against selling used cars at over-ceiling prices. The court appointed the United States Attorney and the O. P. A. District Enforcement Attorney as "attorneys to prosecute the criminal charges . . . on behalf of the Court and of the United States." Appellee's motion to dismiss was granted on the ground that he was entitled under § 202 (g) of the Emergency Price Control Act to immunity from prosecution. The Government appealed to this Court under the Criminal Appeals Act. *Held:*

1. The United States was, in any relevant sense, a party to the proceedings, and the appeal was properly brought under the Criminal Appeals Act. Pp. 78–79.

2. Appellee was not entitled to immunity under § 202 (g) of the Price Control Act and the rule to show cause should not have been dismissed. See *Shapiro* v. *United States, ante,* p. 1. P. 79.

68 F. Supp. 53, reversed.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Quinn, Philip Elman, Robert S. Erdahl* and *Irving S. Shapiro.*

Bernard Margolius argued the cause for appellee. With him on the brief was *Joseph B. Danzansky.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

On Feb. 27, 1946, the Price Administrator filed a petition, in the District Court for the District of Columbia, to institute criminal contempt proceedings against appellee. The petition charged appellee with having made numerous sales of used cars at over-ceiling prices in violation of an injunction previously issued by the District Court. A rule to show cause was issued, but was dismissed on motion of the appellee, on the ground that he was entitled to immunity under § 202 (g) of the Emergency Price Control Act from prosecution for the transactions upon which the petition was founded. 68 F. Supp. 53.

The Government brought this appeal, under the provisions of the Criminal Appeals Act,[1] to review the decision of the District Court. The main issue is the same as that presented in the companion case, *Shapiro* v. *United States, ante,* p. 1, but two additional minor questions are raised:

1. Appellee urges that the appeal was not properly taken by the United States because the Government was not a party to the proceedings in the District Court. The record shows, however, that the litigation was instituted in that court by a petition of the OPA District Enforcement Attorney on behalf of the Price Administrator. When the rule to show cause was issued, the court appointed the United States Attorney and the OPA District Enforcement Attorney as "attorneys to prosecute

[1] 34 Stat. 1246, as amended by 56 Stat. 271, 18 U. S. C. (Supp. V, 1946) § 682, and by § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

the criminal charges contained in the petition filed herein on behalf of the Court and of the United States." See Rule 42 (b) of the Rules of Criminal Procedure, 327 U. S. 865–66. Thus the United States was, in any relevant sense, a party to the proceedings, and the appeal was properly brought under the Criminal Appeals Act. See *United States* v. *Goldman,* 277 U. S. 229, 235 (1928); *Ex parte Grossman,* 267 U. S. 87, 115 *et seq.* (1925).

2. The Government mentions a further consideration, not involved in the *Shapiro* case. The record does not state that the appellee was sworn and produced the records under oath, a condition precedent to the attainment of immunity under a 1906 Amendment, 49 U. S. C. § 48, to the Compulsory Testimony Act of 1893. It is unnecessary to consider this contention both because it does not appear to have been duly raised in the court below, and because the grounds considered and the views set forth in our opinion in the *Shapiro* case suffice to dispose of this appeal.

The decision of the District Court is reversed and the case remanded for further proceedings.

Reversed.

Mr. Justice Frankfurter dissents for the reasons stated in his dissenting opinion in *Shapiro* v. *United States, ante,* p. 36. Mr. Justice Jackson and Mr. Justice Murphy dissent for the reasons stated in Mr. Justice Jackson's dissenting opinion in *Shapiro* v. *United States, ante,* p. 70. Mr. Justice Rutledge dissents for the reasons stated in his dissenting opinion in *Shapiro* v. *United States, ante,* p. 71.

MEMPHIS NATURAL GAS CO. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 94. Argued December 8, 1947.—Decided June 21, 1948.

Petitioner, a Delaware corporation, owns and operates a natural gas pipeline from Louisiana fields to Memphis, Tennessee. Approximately 135 miles of the line lie in Mississippi, and there are two compressor stations in that State. In addition to ad valorem taxes, Mississippi imposes a "franchise or excise" tax of $1.50 for each $1,000 value of capital used, invested or employed within the State. Petitioner, whose business in Mississippi was exclusively interstate, challenged the validity of the latter tax under the Commerce Clause of the Federal Constitution. As applied to petitioner, the Mississippi Supreme Court sustained the tax as recompense to the State for protection of "local activities in maintaining, keeping in repair, and otherwise in manning" the 135 miles of line within the State. *Held:* The judgment of the State Supreme Court is affirmed. Pp. 80–83, 96.

201 Miss. 670, 29 So. 2d 268, affirmed.

The validity under the Federal Constitution of a state franchise tax imposed on petitioner was sustained by the State Supreme Court. 201 Miss. 670, 29 So. 2d 268. This Court granted certiorari. 331 U. S. 802. *Affirmed*, p. 96.

Edward P. Russell argued the cause for petitioner. With him on the brief was *B. L. Tighe, Jr.*

J. H. Sumrall argued the cause and filed a brief for respondent.

MR. JUSTICE REED announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join.

The Memphis Natural Gas Company is a Delaware corporation which owns and operates a pipe line for the transportation of natural gas. The line runs from the

Monroe Gas Field in the State of Louisiana through the states of Arkansas and Mississippi to Memphis and other points in the State of Tennessee. Approximately 135 miles of the pipe line lie within Mississippi; at two points within that state there are compressing stations. It is stipulated that the Gas Company has never engaged in any intrastate commerce in Mississippi; that it has only one customer within the state, the Mississippi Power and Light Company, to which it sells gas from its interstate line at wholesale from several delivery points; that the Gas Company has never qualified under the laws of Mississippi to do intrastate business within that state; that it has no agent for the service of process and that it has no office within the state; and that its only employees and representatives in Mississippi are those necessary to maintain the pipe line and its auxiliary appurtenances.

The Gas Company has paid all ad valorem taxes assessed against its property in Mississippi pursuant to the state law. In addition to the ad valorem taxes, Mississippi imposes a "franchise or excise tax" upon all corporations "doing business" within the state.[1] For the

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[1] Miss. Code § 9313 (1942): "There is hereby imposed . . . a franchise or excise tax upon every corporation . . . now existing in this state, or hereafter organized, created or established, under and by virtue of the laws of the State of Mississippi, equal to $1.50 for each $1,000.00 or fraction thereof, of the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state, except as hereinafter provided. It being the purpose of this section to require the payment to the state of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence."

§ 9314: "For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific

purpose of the Act, "doing business" is defined "[to] mean and [to] include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization." [2] The tax is "equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed" within the state.

The Gas Company filed a petition for review by the State Tax Commission of Mississippi of the franchise tax assessed against it for the years 1942, 1943 and 1944 by the State Tax Commissioner. In this petition the Gas Company argued that the imposition of the tax by the state was an act prohibited by the Commerce Clause of the Federal Constitution. From an order of the Tax Commission approving the action of the Commissioner, the Gas Company appealed to the Circuit Court of Hinds County, Mississippi. That court reversed the Tax Commission, but was itself reversed by the Supreme Court of Mississippi. The Supreme Court said that Mississippi had made "no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the

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statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

[2] Miss. Code § 9312 (1942).

system throughout the 135 miles of its line in this State." 201 Miss. 670, 674, 29 So. 2d 268, 270. It argued that the state tax did not bear directly upon interstate commerce and that any burden imposed upon that commerce was remote and unsubstantial. It concluded that the local tax was not unconstitutional and ordered that the taxes in question, plus penalties, be paid by the Gas Company. A petition for certiorari, under § 237 (b), Judicial Code, was filed in this Court by the Gas Company on May 17, 1947. It presented the question as to whether the judgment violated the Commerce Clause by requiring a foreign undomesticated corporation, engaged in interstate commerce, to pay the tax. That petition was granted June 16, 1947. 331 U. S. 802.

The suggestion is made that by the stipulation of facts in the trial court, Mississippi concedes the truth of an allegation of the challenged petition before the State Tax Commission reading as follows:

> "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession and possession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving it of such right, unless congress should see fit to interpose some contrary regulation. Your Petitioner obtains no protection from the State of Mississippi and acquires no powers or privileges in its interstate activity other than the protection afforded your Petitioner by virtue of the payment of an ad valorem tax on the property used by the Company wholly in interstate commerce."

It is said that because of this concession Mississippi cannot exact a tax from petitioner as the state "affords nothing to this petitioner for which it could ask recompense

by way of a tax." The pertinent part of the stipulation reads: "That all of the facts stated in said petition are true and no proof of the same shall be required in this cause." No contention as to the concession is presented to us by the petition for certiorari, assignment of errors or brief. Petitioner's contention is that the tax levied against it is invalid under the Commerce Clause. Petitioner's failure to raise the question alone would justify a refusal here to consider the contention. See *Connecticut R. Co.* v. *Palmer,* 305 U. S. 493, 496; *Kessler* v. *Strecker,* 307 U. S. 22, 34. The answer to the suggestion, however, seems to us clear. The argument is that the Supreme Court of Mississippi must be reversed because the tax before us "is a tax on the privilege of engaging in the doing of interstate business within the State, and such a tax is . . . invalid under the Commerce Clause." This conclusion seems to be reached by the following analysis. The stipulation between the Company and the State Tax Commission is read as if the phrase "in its interstate activity" modified only the words "powers" and "privileges" and not the word "protection." If that is a proper construction of this stipulation, then the parties have agreed that the Company has obtained by the tax "no protection from the State . . . other than the protection afforded . . . by virtue of the payment of an ad valorem tax . . . ." The dissent then concludes that the imposition of the ad valorem taxes "exhausted" the state's taxing power and, consequently, that the tax "is a tax on the privilege of engaging in interstate business" and, as such, "invalid under the Commerce Clause."

The state Supreme Court construed the tax as "an exaction . . . as a recompense for . . . protection of . . . the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." As we are bound by the construction of the state statute by the state

court, it is idle to suggest that the tax is on "the privilege of engaging in interstate business." Nor can this result be changed by the suggestion that the tax cannot be on any local incidents "because they have already been fully taxed." The local incidents, spoken of by the Supreme Court of Mississippi, were not the taxable events selected for the imposition of the ad valorem tax. These local incidents were the basis for the franchise or excise tax now in controversy. No reason is perceived why Mississippi cannot exact this different tax for the same protection. It is as though the ad valorem rate had been increased. The power to levy such a new tax is not and could not be questioned except as an interference with commerce. The legal question remains as to whether a state can exact a tax on those activities under the Commerce Clause.

The facts of this case present again the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities admittedly necessary to maintain or operate the interstate business of the taxpayer. This transportation by pipe line with deliveries within the state at wholesale only is interstate business. *Panhandle Eastern Pipe Line Co.* v. *Comm'n*, 332 U. S. 507, 513, and cases cited. Notwithstanding the power granted to Congress by the Commerce Clause to regulate the taxation of interstate commerce, if it so desires,[3] that body generally has left the determination to the courts of what state taxes on or affecting commerce were permissible and what impermissible under the Commerce Clause. The states have sought by taxation to collect from the instrumentalities of commerce compensation for the protection and advantages rendered to commerce by state governments. The federal courts have sought over the years to determine the scope of a state's power to tax in the light of the competing inter-

[3] *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 429.

ests of interstate commerce, and of the states, with their power to impose reasonable taxes upon incidents connected with that commerce. See *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, 441. We continue at that task, characterized long ago as an area of "nice distinctions." *Galveston, Harrisburg & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 225.

There is no question here of Due Process. The Gas Company's property is in the taxing state where the taxable incidents occurred. *McLeod* v. *Dilworth Co.,* 322 U. S. 327, 329. See *Nippert* v. *City of Richmond,* 327 U. S. 416, 423. Nor is the measure used to calculate the amount of the tax challenged. That measure is $1.50 on each thousand dollars of capital employed within Mississippi. *Southern Gas Corp.* v. *Alabama,* 301 U. S. 148, 156, Third. The attack on the Mississippi statute is that it violates the Commerce Clause by putting a tax on the commerce itself.

The local incidents covered by the definition of doing business hereinbefore set out, § 9312, Mississippi Code, *supra,* were said by the Supreme Court in this case to be "the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system" in Mississippi. 201 Miss. 670, 674, 29 So. 2d 268, 270.[4]

[4] Such local incidents form a sound basis for taxation by a state of foreign corporations doing interstate business. For example, we have upheld state taxes on sales after completion of the interstate transit, *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33; on production of electricity for interstate commerce, *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, compare *Fisher's Blend Station, Inc.* v. *Tax Comm'n,* 297 U. S. 650, 655; a privilege tax on the operation of machines for the production of electricity to drive gas in interstate commerce, *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303 U. S. 604; a use tax on rails shipped interstate for immediate incorporation into an interstate transportation system, *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167.

We have upheld a franchise tax on a foreign corporation authorized to do business and making sales in a state other than its actual or

The cases just cited in the note show that, from the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce, state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself.[5] But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. *Nippert* v. *City of Richmond, supra,* at 423. The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce.[6] Again, where there is a state exaction for some intrastate privilege that discriminates against interstate commerce, it is invalid even though it is sufficiently disconnected from the commerce to be taxable otherwise.[7]

The Mississippi tax under consideration is not discriminatory. It is levied, in addition to ad valorem taxes, on corporations created under Mississippi laws, those admitted to do business in Mississippi and those operating in

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business domicile, *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331; a privilege tax on a foreign corporation doing business in the state upon a proportion of property in the taxing state that was computed by using interstate commerce as an element, *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290; *Western Cartridge Co.* v. *Emmerson,* 281 U. S. 511; an excise on intrastate manufacturing, added to an ad valorem tax and measured by sales, including out of state, *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459, and see Powell, 60 Harv. L. Rev. 501, 508 and 727, *Freeman* v. *Hewit,* 329 U. S. 249, 255; a license for storing goods at rest in the state under a transit privilege, *Independent Warehouses, Inc.* v. *Scheele,* 331 U. S. 70.

[5] See *Western Live Stock* v. *Bureau,* 303 U. S. 250, 254.

[6] See *Western Live Stock* v. *Bureau,* 303 U. S. 250, 255.

[7] See *Best & Co.* v. *Maxwell,* 311 U. S. 454; *Nippert* v. *City of Richmond, supra,* at 431–32. Cf. *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495, 501–502.

the state without any authority from the state. See note 1, *supra*. Petitioner operated local compressor stations. We have heretofore held that the generation of electric energy for the operation of such stations was subject to state taxation without violation of the Commerce Clause. *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604. A glance at the activities, named above, listed by the Supreme Court of Mississippi, shows that there is no possibility of multiple taxation through the same exactions by other states. The amount of the tax is reasonable.[8] It is properly apportioned to the investment in Mississippi.[9]

However, a state tax upon a corporation doing only an interstate business may be invalid under our decisions because levied (1) upon the privilege of doing interstate business within the state,[10] or (2) upon some local event so much a part of interstate business as to be in effect a

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[8] See *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290, 295, and *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, 514.

[9] See *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, 156, Third, and cases cited; *International Harvester Co.* v. *Evatt*, 329 U. S. 416, 422–23; *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495, 501–502.

[10] This Court has held many times that a state has no power to refuse or tax the privilege of doing interstate business. A foreign corporation, seeking or requiring no privilege from a state such as the power of eminent domain, the right to use public ways or beds of streams, and without federal charter or other federal statutory privilege, cannot be denied the right to enter a state, remain there and operate a purely interstate business without a state franchise. *Crutcher* v. *Kentucky*, 141 U. S. 47, 56; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107 (3); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. See also *California* v. *Pacific R. Co.*, 127 U. S. 1; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *Colorado* v. *United States*, 271 U. S. 153, 164; *State ex rel. Board* v. *Stanolind Pipe Line Co.*, 216 Iowa 436, 445, 249 N. W. 366, 371.

tax upon the interstate business itself.[11] Petitioner asserts that the Mississippi statute so offends.

First. This Court has drawn the distinction in the field of pipe line taxation between state statutes on the privilege of doing business where only interstate business was done and those upon appropriate local incidents. In *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555, the Ozark Pipe Line Corporation operated an oil pipe line from Oklahoma, through Missouri to a point in Illinois. Oil was neither received nor delivered in Missouri. This was interstate transportation. *Interstate Natural Gas Co.* v. *Power Comm'n,* 331 U. S. 682, 689, and cases cited at note 12. It had its principal office in Missouri. It had a license from Missouri authorizing it to engage " 'exclusively in the business of transporting crude petroleum by pipe line.' " Page 561. The state tax was an apportioned franchise tax.[12] It was construed by this Court as a tax "upon the privilege or right to do

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[11] *Freeman* v. *Hewit,* 329 U. S. 249, "because it taxes the very process of interstate commerce" (p. 253), it is "a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause" (p. 256); *Joseph* v. *Carter & Weekes Co.,* 330 U. S. 422, "Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax . . . upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid" (p. 433); this follows "a line of precedents outlawing taxes on the commerce itself" (p. 433). *Galveston, Harrisburg & S. A. R. Co.* v. *Texas, supra* at 224.

See *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 312, n. 11; see comments on *American Mfg. Co.* v. *St. Louis,* n. 4, *supra.*

[12] Mo. Rev. Stat. § 9836 (1919):

". . . Every corporation, not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the state of Missouri equal to one-tenth of one per cent. of the par value of its capital stock and surplus employed in business in this state . . . ."

business." Page 562. *Virginia* v. *Imperial Coal Co.*, 293 U. S. 15, 20. As such a tax upon a corporation doing only an interstate business, it was held invalid under the Commerce Clause.[13]

In *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, a pipe line ran from Louisiana, through Mississippi and back to Louisiana. Two local Mississippi distributors took gas in that state from the re-

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[13] The opinion evoked a dissent by Justice Brandeis which pointed out that: "The tax assailed is not laid upon the occupation . . ."; nor "upon the privilege of doing business." Pp. 567–68. The Justice concluded that "a tax is not a direct burden merely because it is laid upon an indispensable instrumentality of such commerce," but that the contrary is true "where it is upon property moving in interstate commerce." P. 569. Compare *Ozark* with *Atlantic Lumber Co.* v. *Comm'r*, 298 U. S. 553.

The *Ozark* case has had a long history in this Court. Since 288 U. S., it has not been cited in a manner pertinent to our present issue, except to be distinguished, sometimes narrowly. In *Helson & Randolph* v. *Kentucky*, 279 U. S. 245, 249, and *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, 43, it was cited with approval for the proposition that a state cannot lay a tax on the occupation or the business of carrying on interstate commerce. In *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, *Ozark* was relied upon to hold unconstitutional a state tax upon a corporation which was qualified to do intrastate business within the state but which in fact did only an interstate business. Cardozo, J., joined by Brandeis, J., and Stone, J., dissented on the ground that the tax could be supported as a tax laid upon the privilege to do intrastate business. *Ozark* was next before the Court in *Virginia* v. *Imperial Coal Co., supra*, a case involving a tax on tangible and intangible property situated and used within the state to carry on an exclusively interstate business. In that case it was distinguished on the ground that an ad valorem property tax, and not a privilege tax, was before the Court. In *Atlantic Lumber Co.* v. *Comm'r*, 298 U. S. 553, involving an excise tax on corporations doing business within Massachusetts, *Ozark* was again distinguished, this time on the ground that the Lumber Co. was engaged in local activities within the state and, therefore, that the burden imposed upon its interstate commerce was remote and incidental. Again, in *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148,

spondent. Mississippi sought to tax the respondent under a privilege tax law that required the pipe line company to get a license to exercise the privilege desired, that is, to operate an interstate pipe line.[14] This Court held that the entire business of the respondent was interstate despite a claimed local activity by the reduction of pressure to deliver gas to the Mississippi distributors. It followed that the state license for the privilege of engaging in the business of operating a pipe line was an invalid burden under the Commerce Clause.[15]

Ozark was found to be inapposite because of factual differences. *Southern Gas* ruled upon the constitutionality of a tax assessed on the basis of the same tax that was before this Court in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama, supra.* The state tax was held constitutional by the *Southern Gas* case as a tax exacted for the privilege of doing an intrastate business by a company in fact engaging in intrastate business in Alabama.

[14] Miss. Gen. Laws (1930), c. 88, § 3: "Every person desiring to engage in any business, or exercise any privilege hereinafter specified, shall first, before commencing same, apply for, pay for, and procure from the proper officer a privilege license authorizing him to engage in the business, or exercise the privilege specified therein; and the amount of tax shown in the following schedules is hereby imposed for the privilege of engaging and/or continuing in the businesses set out therein."

Id., § 163: "Upon each person engaging and/or continuing in this state in the business of operating a pipe line or transporting in or through this state oil, or natural, or artificial gas, through pipes, and/or conduits, a tax, as follows: [On each mile a varying tax that depended upon the diameter of the pipe]."

[15] The same rationale has led this Court at times to declare invalid similar taxes on foreign corporations, admitted to do business in a state and doing only an interstate business through activities within the state. The leading decisions supporting this view (*Cheney Brothers Co.* v. *Massachusetts,* 246 U. S. 147, and *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203) have been strictly limited. *Atlantic Lumber Co.* v. *Commissioner,* 298 U. S. 553; cf. *Southern Gas Corporation* v. *Alabama, supra,* at p. 156, and dissent in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218, 229, at 237. In the *Cheney* case an excise tax for the privilege of doing

On the other hand, in *Interstate Natural Gas Co.* v. *Stone,* 308 U. S. 522, we affirmed *per curiam* a judgment of the Fifth Circuit in *Stone* v. *Interstate Natural Gas Co.,* 103 F. 2d 544, on the authority of *Southern Gas Corporation* v. *Alabama, supra* at 153, 156–57. The tax in question in the 308 U. S. case was exacted by the same Mississippi statute employed here. This differs from the Mississippi statute in the *Interstate* case in 284 U. S. The *Interstate* case in 308 U. S. differed from this present case, so far as is material, only in the fact that the foreign corporation filed a copy of its charter as a prerequisite to doing business in Mississippi and appointed an agent for the service of process. The page references in the *Stone* citation of the *Southern Gas* case show that this Court considered the Mississippi tax in the *Stone* case as one not on business but " 'on the privilege of exercising corporate functions within the State and its employment of its capital in [Mississippi].' " *Southern Gas Corp.* v. *Alabama, supra,* 153. In the *Southern Gas* case, page 155, the company did intra-

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business in Massachusetts of an unapportioned percentage of its authorized capital stock (Mass. Acts, 1909, c. 490, Part III, § 56) was invalidated as being wholly on interstate commerce although it maintained "in Boston a selling office with one office salesman and four other salesmen who travel through New England. The salesmen solicit and take orders, subject to approval by the home office in Connecticut, and it ships directly to the purchasers. No stock of goods is kept in the Boston office, but only samples used in soliciting and taking orders. Copies and records of orders are retained, but no bookkeeping is done, and the office makes no collections. The salesmen and the office rent are paid directly from Connecticut and the other expenses of the office are paid from a small deposit kept in Boston for the purpose. No other business is done in the State." P. 153.

In the *Alpha Portland* case where, on the assumption that the taxpayer had obtained a right to do business in the state, under similar circumstances an unapportioned excise on the privilege to do business in Massachusetts was invalidated because a burden on commerce.

state business, but in the *Stone* case no intrastate business was done. Thus the local event of qualifying for intrastate business, which occurred in both *Southern Gas* and *Stone,* brought a different result from that in the *Ozark* case and in *Interstate,* 284 U. S., where the privilege or right to do interstate business was protected. Mississippi, through its Supreme Court, has declared that there is no attempt to tax the privilege of doing an interstate business or to secure anything from the corporation by this statute except compensation for the protection of the enumerated local activities of "maintaining, keeping in repair, and otherwise in manning the facilities." 201 Miss. 674, 29 So. 2d 270. Under § 9314, quoted in note 1, in the light of that statute's definition of "doing business" set out on pp. 81–82, *supra,* this is a reasonable meaning to give the taxing statute. We must accept the state court's interpretation.[16] We therefore conclude that the Mississippi tax here involved is not upon the privilege of doing an interstate business.

Second. We come now to the second question. That is whether the challenged excise for carrying on within the state the aforementioned activities of maintenance, repair and manning by a corporation engaged solely in interstate commerce may be taxed. The answer on this point depends upon whether these activities are so much a part of the interstate business as to be under the protection of the Commerce Clause as this Court has construed it.[17] In this case the local activities are those involved in the maintenance of the pipe line. This tax is not an unapportioned tax on gross receipts from the commerce itself. It is measured by a proportion of the capital employed within the state. It cannot be duplicated in other states.

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[16] *St. Louis S. W. R. Co.* v. *Arkansas,* 235 U. S. 350, 362; *Southern Gas Corp.* v. *Alabama, supra* at 153, First; *Skiriotes* v. *Florida,* 313 U. S. 69, 79; *Caldarola* v. *Eckert,* 332 U. S. 155, 158.

[17] See note 11, *supra.*

Compare *Western Live Stock* v. *Bureau*, 303 U. S. 250, 255. In *Ozark Pipe Line* v. *Monier, supra*, this Court, at p. 565, spoke of such activities as set out below.[18] If it was intended to say that such in-the-state activities as there described could not be taxed, we disagree with that conclusion. We are inclined to the view that the fact that the tax there under consideration was considered a tax "upon the privilege or right to do business," led the Court to point out that as the local activities were essential to that business, they were not taxable activities. The pipe line itself and all appurtenances are essential, yet an ad valorem tax can be laid.[19]

In taxation, we do not have the problems raised by many decisions on state regulations alleged to impede

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[18] This Court said, 266 U. S. at 565: "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business." See also *Heyman* v. *Hays*, 236 U. S. 178, 185.

[19] *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439, 445:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

See also *Northwest Airlines* v. *Minnesota*, 322 U. S. 292; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530.

the free flow of commerce when not nationally uniform. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761. Regulations may be imposed by the state on commerce. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n, supra; Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28. When state taxation of activities or property within a state is involved, different considerations control. It is no longer a question of actual interruption of the operation of commerce. *Kelly* v. *Washington,* 302 U. S. 1, 14. Rather a prohibited tax exaction is one beyond the power of the state because the taxable event is outside its boundaries, *McLeod* v. *Dilworth Co., supra,* or for a privilege the state cannot grant. See note 10, *supra.* Is it bad because a tax on the commerce itself? We have sustained a fee for the privilege of using state courts, exacted by the state from a business licensed by the United States to handle customs charges. *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202.[20] Likewise a special privilege tax upon an interstate automobile transportation company for the use of the state roads has been approved. *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495.

The Mississippi excise has no more effect upon the commerce than any of the instances just recited. The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem

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[20] In the *Union Brokerage* case we dealt not with an annual tax on franchises or licenses but with a state's single exaction from a foreign corporation for the right to use the courts of the state. The company was a customhouse broker engaged wholly in thus earning fees by " 'charges upon the commerce itself,' " p. 209. There were incidental activities in the state in furtherance of this main purpose, p. 208: "Union's business is localized in Minnesota, it buys materials and services from people in that State, it enters into business relationships, as this case, a suit against its former president, illustrates, wholly outside of the arrangements it makes with importers or exporters."

taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment.

MR. JUSTICE RUTLEDGE, concurring.

In accordance with views which I have heretofore expressed,[1] it is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or "jurisdiction to tax" in that sense is concerned;[2] it is nondiscriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character;[3] is duly apportioned, that is, does not undertake to tax any interstate activities

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[1] See *McLeod* v. *Dilworth Co.*, 322 U. S. 327; *General Trading Co.* v. *Tax Comm'n, id.* 335; *Harvester Co.* v. *Dept. of Treasury, id.* 340, separate opinion, *id.* 349; *Freeman* v. *Hewit,* 329 U. S. 249, concurring opinion at 259.

[2] See 322 U. S. at 352, 353; *Nippert* v. *Richmond,* 327 U. S. 416, 423, 424.

[3] See Miss. Code § 9313 (1942), imposing a comparable tax, of identical amount, upon companies organized under Mississippi laws. Intrastate business done in the state obviously would be subject to one tax or the other, depending on whether the company doing it were organized under the state's laws or those of another state.

carried on outside the state's borders;[4] and cannot be repeated by any other state.[5]

In this view the tax is not different in any substantial respect, for purposes of the commerce clause's prohibitive application, from the apportioned tax upon gross receipts from interstate transportation levied by New York and sustained by the decision recently rendered in *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653.[6] That tax is nonetheless one upon the commerce, although it is apportioned. The apportionment, however, guards it from the vice of taxing commerce done in other states and thus also from multiplication by them.[7] In my view the same consequence follows here, in practical effect, both for the bearing of the tax and for saving its validity.

It may be that for the purposes of this case there is little more than a verbal difference in so regarding the

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[4] The statute, Miss. Code §§ 9313 and 9314 (1942), expressly measures and limits the tax by an amount "equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed *within this state* . . . ." (Emphasis added.)

[5] Cf. note 4. Apportionment in itself prevents taxation of extra-state "events" or portions of the business done, unless the apportionment is itself constitutionally invalid as not reflecting a sufficient approximation to what the state may be entitled, on the facts, to tax. Cf. Stone, C. J., dissenting in *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, 315–316, and authorities cited.

[6] It is, of course, for New York to say whether its tax will be applied upon the apportioned basis permitted by the Court's opinion. There would seem to be little doubt that such an application will be made, in view of the state's alternative argument here for sustaining the tax to that extent in the event its unapportioned application should be found invalid.

[7] See *Freeman* v. *Hewit,* 329 U. S. 249, 266 (concurring opinion) and authorities cited.

That the apportionment in the one case is made in relation to mileage and in the other to the value of capital "used, invested or employed within this state" is of no significance, since the states have considerable latitude in the selection of fair methods of making apportionment. Cf. note 5.

tax and in looking at it as one not "upon" the commerce, although affecting it, but as being laid upon "incidents of the commerce" or "taxable events" taking place in Mississippi which are regarded as being "sufficiently separate from" the commerce, whether by reason of the apportionment or otherwise, to sustain the tax. To the extent that no greater difference is presently involved, I accept the Court's conclusions and its reasoning.

But the difference conceivably may be of large, indeed of controlling, importance for other cases. And, so far as this may be true, I am unable to revert to rationalizations which make merely verbal formulae without reflection of differences in substantive effects controlling in these matters.

The New York legs of the journey involved in the *Central Greyhound* case, *supra,* are interstate commerce, as much as those in New Jersey and Pennsylvania. They do not lose that character merely because an apportioned tax may be levied upon the gross receipts from them. The incidence of that tax is flatly on the commerce, though only on the local portion of it. So here I do not think that the local activities for the protection of which the Mississippi tax purports in terms to be laid become separate from the interstate business which petitioner conducts in Mississippi, either by reason of the apportionment or otherwise. But they are incidents of carrying on that business taking place in Mississippi and only there, for which Mississippi affords protection received from no other state or the United States. Nor can any other state give that protection. For that portion of the business and the protection given it, I think the state is entitled to levy such a tax as has been placed here. Nothing in the commerce clause or its great purposes forbids such an exaction. Nor is the state limited to a single exaction for different or indeed like protections

afforded, so long as each is safeguarded against prohibited effects upon commerce, as are those laid by Mississippi, and their aggregate cannot be shown to contravene the clause's purpose.

Accordingly, I concur in the Court's judgment.

MR. JUSTICE FRANKFURTER, with whom THE CHIEF JUSTICE, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON concur, dissenting.

This litigation began before the State Tax Commission of Mississippi by a petition of the Memphis Natural Gas Company for a revision of the franchise tax assessed against that Company under the Franchise Tax Law of Mississippi. On judicial review of this administrative denial, the parties stipulated that "all of the facts stated in said petition are true and no proof of the same shall be required in this cause." [1] The decision therefore must be based on the undisputed allegations of the petition.

Petitioner, a Delaware corporation, owns and operates a pipeline for the transportation of natural gas running from the gas fields in Louisiana through Arkansas and Mississippi into Tennessee. Petitioner has conducted no intrastate business within Mississippi, nor is it qualified to do so. The Company paid Mississippi an income tax "upon that part of its net income fairly attributable to activities in Mississippi." It also pays *ad valorem* taxes to the six counties through which the Mississippi portion

[1] The second paragraph of the stipulation, in full, is as follows: "That all of the facts stated in said petition are true and no proof of the same shall be required in this cause. The Stipulation that the facts are true shall be limited to the facts stated in the petition and the defendants shall not, by virtue of this Stipulation, be considered or held to have agreed with any of the legal propositions and arguments made by the Memphis Natural Gas Company in said petition as the parties recognize that these legal questions and arguments are for determination by the Court."

of its interstate pipeline—some 135 miles—runs. The counties are: Washington, Bolivar, Sunflower, Coahoma, Tunica, and De Soto. It also pays *ad valorem* property taxes to the cities of Greenville (Washington), Indianola (Sunflower), and Clarksdale (Coahoma). In addition to these income and local *ad valorem* property taxes, not here questioned, the State Tax Commission assessed the franchise tax in controversy. This was done under an enactment of 1940, which imposed on all foreign corporations "doing business within this State" [2] a "franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of capital used, invested or employed within this state . . . ." Ch. 115 of the 1940 General Laws of Mississippi § 2; Miss. Code § 9314 (1942). The record is barren of any indication that "the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state," *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, other than those for which the State, through its subordinate taxing authorities, has already made exaction, as contrasted with those which are given not by the State but by the United States and for which the State may not make exaction. *Crutcher* v. *Kentucky*, 141 U. S. 47. The record not only makes no such affirmative showing; it denies the foundation for suggesting that the State has given something for which it can exact a return. For it was stipulated between the Company and the State Tax Commission that

> "Your Petitioner obtains no protection from the State of Mississippi and acquires no powers or privileges in its interstate activity other than the protection

[2] The statute defined "doing business" to "mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust." Miss. Code § 9312 (1942).

> afforded your Petitioner by virtue of the payment of an ad valorem tax on the property used by the Company wholly in interstate commerce." [3]

Even assuming therefore that, while Mississippi cannot impose a tax for the privilege of doing an exclusively interstate business within the State, it can cast an *ad valorem* property tax on the Mississippi portion of the corpus of its interstate property in a form having all the earmarks of a franchise tax, the assessment here challenged on the record before us cannot stand. And for a very simple reason.

There would hardly be disagreement, I take it, that Alabama could not constitutionally impose an *ad valorem* tax on these 135 miles of pipeline in Mississippi. This is so not because the pipeline does not traverse Alabama—concededly the assailed tax cannot be sustained merely because the pipeline travels through Mississippi—but because Alabama affords nothing to this petitioner for which it could ask recompense by way of a tax. We cannot know, unless we are instructed, how governmental powers are distributed in Mississippi as between its State and local governments. And the petitioner has no proof of its allegations that the nine county and city taxing authorities to which the petitioner pays approximately $85,000 a year in *ad valorem* taxes supply all the benefits which it enjoys from the State and that the State in seeking to enforce the franchise tax against the petitioner

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[3] Particularly in the light of the substantial taxes paid by the petitioner for such protection to the nine county and city taxing authorities, where nothing else appears in the record except the exaction, this uncontroverted allegation must control over the presumptive inference that might otherwise be drawn in favor of the validity of the State's exaction. This Court, as the special guardian of the Commerce Clause, ought not to indulge in casuistic assumptions that the allegations left uncontroverted by the State do not correspond to the realities of the Mississippi situation.

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is asking something (approximately $3,500 a year) for nothing. But "no proof of the same shall be required in this cause," according to the stipulation between the parties, to which the State Tax Commission has set its name. See *H. Hackfeld & Co.* v. *United States,* 197 U. S. 442, 446. In holding that Mississippi is "exacting compensation under this statute for the protection it affords the activities within its borders" to this petitioner the Court is flying in the face of the record. On the basis of that record Mississippi can no more exact this tax against this pipeline than could Alabama. For we are all agreed that where the only "local incident" is the fact of interstate commerce—that the interstate pipeline goes through Mississippi—the tax is necessarily a tax upon the privilege of doing interstate business. The Commerce Clause put an end to the power of the States to charge for that privilege.

But it is suggested that we are barred from reaching this conclusion, though the record compels it, because it deals with an issue not before us. Let us see. The petition for certiorari presented this question:

> "Admittedly petitioner is engaged in Mississippi solely in interstate commerce. It pays to Mississippi *ad valorem* and income taxes and thus contributes materially to the cost of local government. An undomesticated foreign corporation has the right to engage in Mississippi in interstate commerce without paying for the privilege as the privilege flows from the Commerce Clause of the Federal Constitution and may not be directly burdened by the imposition of a local 'franchise or excise tax.' "

By this statement the petitioner clearly asserted that insofar as Mississippi has power to tax this interstate business for the protection accorded the "local incidents" of that business, the taxes levied by the State through its

local taxing authorities exhausted the power. To tax beyond that is a bald tax on the privilege of doing interstate commerce. If we were precluded from deciding a case otherwise than by the precise course of argument presented by counsel, many of our opinions would have to be deleted from the United States Reports.

The Court however attempts to deal with the contention. As I understand the Court's opinion, it argues that even if it be true that this tax does not recompense the State for the local protection accorded the petitioner's activities, this is wholly immaterial as the Supreme Court of Mississippi has given the tax a contrary interpretation. The opinion offers the extraordinary suggestion that although the State Tax Commission on behalf of the State conceded that the exaction as a matter of fact afforded no protection, the State Supreme Court may disregard such a concession of fact, having all the force of proof, and hold as a matter of law that protection beyond that for which taxes were already imposed was enjoyed by the interstate business.

In the first place the Supreme Court of Mississippi purported to do no such thing. On the contrary, its opinion concluded as follows:

> "Does the franchise tax here demanded amount to enough to have any substantial effect to block or impede the free flow of commerce, or is it at all out of reasonable proportion to the services and protection which must be furnished by the State in and about the stated local activities? The franchise tax demanded is approximately $3,400 per annum, whereas the ad valorem taxes are approximately $82,000 a year, whence the obvious answer to this last question must be in the negative." (201 Miss. 670, 676.)

Of course, a State tax on interstate commerce does not become a valid one merely because "it's only a little

one." And even in these days, an unconstitutional exaction by a State of $3,400 is not *de minimis*.

But even if the State court's opinion were susceptible of the construction accorded it by this Court, its *ipse dixit* in applying the Commerce Clause would not be binding on this Court. Of course the construction of a statute is for the State court. But the construction of the statute which this Court now attributes to the State Supreme Court, whereby the tax is imposed not for any "local incidents"—because these have already been fully taxed—makes clear beyond peradventure that it is a tax on the privilege of engaging in the doing of interstate business within the State, and such a tax is, of course, invalid under the Commerce Clause.

It is a novel abdication of this Court's function that we are bound by a State court's views of the constitutional significance of a State tax on interstate business, but are not bound by an unambiguous stipulation by the State that no protection was afforded by the State to the taxable local incidents of the interstate business beyond that for which the State, through its local agencies, has already levied the tax.

A State may of course increase the rate of a properly apportioned *ad valorem* tax of an interstate business. Compare *Wallace* v. *Hines*, 253 U. S. 66. But it can do so only by increasing the rate. The mere fact that the same number of dollars could have been exacted by the State in a constitutional way cannot legalize every tax, "as though the *ad valorem* rate had been increased." Because a State could obtain twice the amount of revenue that it gets from an interstate business by increasing the *ad valorem* rate does not constitutionally justify a tax which, by virtue of a stipulation having the force of truth, is not referable to any protection which the State accords.

These are not abstract objections against disregarding the tax which the State has in fact levied and treating it as though it levied some other tax. Practical considerations preclude such a patent endeavor to circumvent the restrictions that the Commerce Clause places upon the taxing powers of the States. A State legislature may be ready to levy a tax for the privilege of doing interstate business within the State—as legislatures have again and again attempted to do—and not be prepared to increase outright the *ad valorem* rate.

The suggestion that an otherwise unconstitutional tax may be treated "as though the *ad valorem* rate had been increased" is an easy way of sustaining almost every tax that would otherwise fall under the ban of the Commerce Clause by transmuting it into an assumed increase in the rate of an *ad valorem* tax. The suggestion has the merit of inventiveness. In the competition for revenue among the States, it is an inventiveness that subjects the hitherto great boon of free trade across State lines to the bane of multitudinous local tariffs.

The judgment should be reversed.

UNITED STATES *v.* CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

No. 695. Argued April 28–29, 1948.—Decided June 21, 1948.

A labor organization and its president were indicted for violations of § 313 of the Corrupt Practices Act of 1925, as amended by § 304 of the Labor Management Relations Act of 1947, which prohibits contributions or expenditures by corporations and labor organizations in connection with federal elections. The indictment charged that the labor organization made, and its president consented to, expenditures for the publication of a weekly periodical, in a certain issue of which appeared an article by its president urging members to vote for a particular candidate in a forthcoming congressional election; and that it made expenditures for the publication and distribution of extra copies of that issue in connection with the election; but it did not charge that free copies were distributed to nonsubscribers, nonpurchasers or persons not entitled to receive copies as members of the union. The District Court sustained a motion to dismiss on the ground that the Act, so far as it related to expenditures by labor organizations in connection with federal elections, violated the First Amendment of the Federal Constitution. The Government appealed directly to this Court under the Criminal Appeals Act. *Held:*

1. The indictment does not state an offense under § 313 of the Act. Pp. 107–110, 120–124.

2. The interpretation here placed on § 313 is supported by the history, the language, and the purpose of the section, and by the fact that grave doubt as to its constitutionality would arise were it construed as applicable to the acts charged in the indictment. Pp. 113–122.

3. On review under the Criminal Appeals Act, this Court is not required to pass upon the constitutionality of § 313 when the indictment does not state an offense under it. P. 110.

77 F. Supp. 355, affirmed.

Respondents, a labor organization and an officer thereof, were indicted for violations of § 313 of the Corrupt Practices Act, as amended by § 304 of the Labor Management

Relations Act of 1947. The District Court dismissed the indictment on the ground of unconstitutionality of the challenged provision of the Act. 77 F. Supp. 355. The Government appealed directly to this Court under the Criminal Appeals Act. *Affirmed* on another ground, p. 124.

Jesse Climenko argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg.*

Charles J. Margiotti and *Lee Pressman* argued the cause for appellees. With them on the brief was *Frank Donner.*

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll, Herbert S. Thatcher* and *James A. Glenn* for the American Federation of Labor; *Jerome Y. Sturm* for the International Association of Machinists; *Osmond K. Fraenkel, Arthur Garfield Hays* and *Burton A. Zorn* for the American Civil Liberties Union; and *Irving R. M. Panzer* for the American Veterans Committee.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal presents a problem as to the constitutionality of § 313 of the Federal Corrupt Practices Act of 1925, as amended by § 304 of the Labor Management Relations Act of 1947. Section 313 of the Federal Corrupt Practices Act now reads as stated in the margin.[1]

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[1] § 304, Labor Management Relations Act, 1947, 61 Stat. 159, enacted June 23, 1947:

" 'SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution *or expenditure* in connection with any election to any political office, *or in connection with any primary election or political convention or caucus held to select candidates for any political office,* or for any corporation whatever, or any labor organization to make

An indictment was returned at the January 1948 term in the District Court of the United States for the District of Columbia on two counts charging in count I the Congress of Industrial Organizations and in count II its President, Philip Murray, with violation of § 313 of the Federal Corrupt Practices Act because of the publication and distribution in the District of Columbia of an issue, Vol. 10, No. 28, under date of July 14, 1947, of "The CIO News," a weekly periodical owned and published by the CIO at the expense and from the funds of the CIO and with the consent of its President, Mr. Murray. The number of "The CIO News" in question carried upon its front page a statement by Mr. Murray as President of the CIO, urging all members of the CIO to vote for Judge Ed Garmatz, then a candidate for Congress in Maryland at a special election to be held July 15, 1947. The statement said it was made despite § 313 in the belief that the section was unconstitutional because it abridged rights of free

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a contribution *or expenditure* in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, *or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices,* or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution *or expenditure* in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution *or expenditure* by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this section "labor organization" *means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'* "

The additions of 1947 are italicized.

speech, free press and free assemblage, guaranteed by the Bill of Rights.

The defendants moved to dismiss the indictment on the ground that § 313 as construed and applied and upon its face abridged as to the CIO and its members and Mr. Murray freedom of speech, press and assembly and the right to petition the Government for a redress of grievances in violation of the Constitution; that the classification of labor organizations was arbitrary and the provisions vague in contravention of the Bill of Rights; and that the terms of the section were an invasion of the rights of defendants, protected by the Ninth and Tenth Amendments. The District Court sustained the motion to dismiss on the ground that as "no clear and present danger to the public interest can be found in the circumstances surrounding the enactment of this legislation" the asserted abridgment of the freedoms of the First Amendment was unjustified.[2] 77 F. Supp. 355. In the order granting the motion to dismiss, the District Court defined its ruling as follows:

> ". . . that that portion of Section 313 of the Corrupt Practices Act, as amended by Section 304 of the Labor-Management Relations Act, 1947, which prohibits expenditures by any labor organization in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, is unconstitutional."

We accepted jurisdiction of the Government's appeal under the Criminal Appeals Act. 18 U. S. C. § 682.

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[2] *Thornhill* v. *Alabama,* 310 U. S. 88; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, and *Thomas* v. *Collins,* 323 U. S. 516, were cited.

The briefs and arguments submitted to us support and attack the constitutionality of § 313 of the Federal Corrupt Practices Act on its face—at least so far as unconstitutionality is declared in the above order. We do not admit any duty in this Court to pass upon such a contention on an appeal under the Criminal Appeals Act except in cases of logical necessity. *United States* v. *Petrillo,* 332 U. S. 1. Although the case turned below on the constitutionality of the provision, the Criminal Appeals Act does not require us to pass upon the constitutionality of a federal statute where the indictment does not state an offense under its terms. *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 88, 97. Compare *United States* v. *Carbone,* 327 U. S. 633. Our first obligation is to decide whether the indictment states an offense under § 313. As we hereafter conclude that this indictment does not charge acts embraced within its scope, this opinion is limited to that issue.

Indictment.—The presently essential parts of the indictment are set out in the margin.[3] It will be noted

[3] "(3) That at all the times hereinafter mentioned, the said defendant CIO owned, composed, edited, and published a weekly periodical known as 'The CIO News', and the said defendant CIO paid all of the costs and made all of the expenditures necessary and incidental to the publication and distribution of said periodical, 'The CIO News', from the funds of the said defendant CIO, including the salaries of the editors and contributors and other writers of texts set forth in said periodical including also the cost of the printing of the said periodical and the cost of the distribution of the said periodical, and all such payments and expenditures, including those representing the cost and distribution of the issue of said 'The CIO News' under date of July 14, 1947, and designated as Volume 10, No. 28, were made by said defendant CIO at Washington, in the District of Columbia, and within the jurisdiction of this Court."

(6) "(b) That the defendant CIO also caused one thousand copies of the issue of the publication, 'The CIO News', dated July 14, 1947, and designated as the issue known as Volume 10, No. 28, to be specially moved and transported from Washington, District of Columbia, into the Third Congressional District of the State of Maryland, by

that paragraph (3) does not allege the source of the CIO funds. The paragraph indicates on its face that "The CIO News" was a regularly published weekly periodical of which the challenged issue was Vol. 10, No. 28. The funds used may have been obtained from subscriptions of its readers or from portions of CIO membership dues, directly allocated by the members to pay for the "News," or from other general or special receipts.

We do not read the indictment as charging an expenditure by the CIO in circulating free copies to nonsubscribers, nonpurchasers or among citizens not entitled to receive copies of "The CIO News," as members of the union. The indictment, count I, paragraph (3), charged the CIO with making expenditures from its funds for "the cost of distribution" of the paper, in paragraph (6) (a), with paying approximately $100 for postal charges for the challenged issue and "causing said article to be distributed in the Third Congressional District of the State of Maryland and elsewhere in connection with the special election held in that Congressional District on the fifteenth day of July 1947." In paragraph (6) (b) there are allegations about certain extra copies. These are set out in the marginal note 3 *supra*. The extras we assume were published pursuant to the order of Mr. Murray in the article.[4] We conclude that the indictment charges nothing more as to the extras than that extra copies of the "News"

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mailing the said one thousand extra copies to the Regional CIO Director at Baltimore, Maryland, and caused the funds of the said defendant CIO to be expended in printing, packaging and transportation of said extra copies of the periodical, 'The CIO News', in connection with the aforesaid special election."

[4] The direction was in this form: "I therefore have directed and requested the editor of the CIO News to publish this statement, including the following paragraphs, and to give to this issue of the CIO News proper circulation among the members of CIO unions in the City of Baltimore and, particularly, within the Congressional District in which this election is scheduled to take place."

were published for distribution and were distributed in regular course to members or purchasers and that no allegation has been made of expenditures for "free" distribution of the paper to those not regularly entitled to receive it.

Scope of Section 313.—The construction of this section as applied to this indictment turns on the range of the word "expenditure," added to the section by § 304 of the Labor Management Relations Act of 1947, as indicated in note 1, *supra*. "Expenditure" as here used is not a word of art. It has no definitely defined meaning and the applicability of the word to prohibition of particular acts must be determined from the circumstances surrounding its employment. The reach of its meaning raised questions during congressional consideration of the bill when it contained the present text of the section. Did it cover comments upon political personages and events in a corporately owned newspaper? 93 Cong. Rec. 6438. Could unincorporated trade associations make expenditures? *Id.*, 6439. Could a union-owned radio station give time for a political speech? *Id.*, 6439. What of comments by a radio commentator? *Id.*, 6439. Is it an expenditure only when A is running against B or is free, favorable publicity for prospective candidates illegal? *Id.*, 6440. What of corporately owned religious papers supporting a candidate on moral grounds? The Anti-Saloon League? *Id.*, 6440.

The purpose of Congress is a dominant factor in determining meaning.[5] There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to

[5] *United States* v. *Kirby*, 7 Wall. 482, 486–87; *Hawaii* v. *Mankichi*, 190 U. S. 197, 211; *Fort Smith & Western R. Co.* v. *Mills*, 253 U. S. 206, 209; *United States* v. *Katz*, 271 U. S. 354, 359; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, 485; *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391, n. 4; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 544.

be interpreted in the light of previous experience and prior enactments.[6] Nor, where doubt exists, should we disregard informed congressional discussion.[7]

Section 304 of the Labor Management Relations Act of 1947 is not a section without a history. Its earliest legislative antecedent was the Act of January 26, 1907, which provided:

> "That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator. . . ." 34 Stat. 864–65.

This legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution.[8] Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders.[9]

The next important legislation was the Federal Corrupt Practices Act, 1925. This statute was the legislative

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[6] *Burnet* v. *Harmel*, 287 U. S. 103, 108; *Boston Sand Co.* v. *United States*, 278 U. S. 41.

[7] *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479.

[8] See 40 Cong. Rec. 96; 41 Cong. Rec. 22.

[9] See Hearings before the House Committee on the Election of the President, 59th Cong., 1st Sess. 76 (1906); 40 Cong. Rec. 96.

In 1909 the Criminal Code of the United States, which codified, revised and amended the penal laws of the country, was passed. 35 Stat. 1088. The Act of 1907 was reenacted as § 83. 35 Stat. 1103.

response to the decision of this Court in *Newberry* v. *United States,* 256 U. S. 232. Cf. *United States* v. *Classic,* 313 U. S. 299. The *Newberry* case held that federal limitation upon expenditures by candidates was unconstitutional as applied to expenditures made in the course of a primary election for the Senate.[10] While that case did not directly concern itself with the Act of 1907, it was widely construed to have invalidated all federal corrupt practices legislation relating to nominations. Therefore, the 1925 Act reenacted the earlier prohibitions against corporate contributions for political purposes with two significant changes. The phrase "money contribution" of 1907 was changed to read "contribution," [11] and primaries and conventions were expressly excluded from the scope of the legislation.[12]

The statute immediately preceding § 304 in time was the War Labor Disputes Act of 1943.[13] This Act extended, for the duration of the war,[14] the prohibitions of

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[10] 36 Stat. 822, as amended by 37 Stat. 25.

[11] 43 Stat. 1074. "Contribution" was defined to include "a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution." 43 Stat. 1071.

[12] 43 Stat. 1070.

[13] 57 Stat. 167. "It is unlawful for any . . . labor organization to make a contribution in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section."

[14] 57 Stat. 168. "Except as to offenses committed prior to such date, the provisions of this Act and the amendments made by this Act shall cease to be effective at the end of six months following the termination of hostilities in the present war, as proclaimed by the President, or upon the date (prior to the date of such proclamation) of the passage of a concurrent resolution of the two Houses of Congress stating that such provisions and amendments shall cease to be effective."

the Act of 1925 to labor organizations. Its legislative history indicates congressional belief that labor unions should then be put under the same restraints as had been imposed upon corporations. It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized,[15] and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose.[16]

When Congress began to consider the Labor Management Relations Act of 1947 it had as a guide the 1944 presidential election, an election which had been conducted under the above amendment to the Act of 1925. In analyzing the experience of that election, a serious defect was found in the wording of the Act of 1925. The difficulty was that the word "contribution" was read narrowly by various special congressional committees investigating the 1944 and 1946 campaigns.[17] The concept of "contribution" was thought to be confined to direct gifts or direct payments.[18] Since it was obvious that the statute as construed could easily be circumvented through indirect contributions, § 304 extended the prohibition of § 313 to "expenditures." [19]

The Labor Management Relations Act of 1947 was the subject of extensive debates in Congress. Embracing as

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[15] See Hearings before a Subcommittee of the Committee on Labor on H. R. 804, and H. R. 1483, 78th Cong., 1st Sess. 2, 4; S. Rep. No. 101, 79th Cong., 1st Sess. 24.

[16] See Hearings on H. R. 804 and H. R. 1483, *supra*, n. 15, 117–18, 133; 89 Cong. Rec. 5334, 5792; 93 Cong. Rec. 6440.

[17] See H. R. Rep. No. 2093, 78th Cong., 2d Sess. 11; S. Rep. No. 101, *supra*, n. 15, 57–59; H. R. Rep. No. 2739, 79th Cong., 2d Sess. 39–40; S. Rep. No. 1, Part 2, 80th Cong., 1st Sess. 37, 38–39.

[18] See note 17, *supra*.

[19] This point was repeatedly emphasized in the Senate debates. See 93 Cong. Rec. 6436–39.

it did a number of controversial issues, the discussion necessarily covered a wide range. It is not surprising, therefore, to find congressional explanation of the intended scope of the specific provision of § 304, in issue here, scanty and indecisive. We find, however, in the Senate debates definite indication that Congress did not intend to include within the coverage of the section as an expenditure the costs of the publication described in the indictment. As we have stated above, there are numerous suppositional instances of acts by corporations or unions that approach the border line of the expenditures that are declared unlawful by § 313 of the Corrupt Practices Act. As we are dealing on this appeal with the scope of § 313 as applied to an indictment that charges certain allegedly illegal acts, we propose to confine our examination of legislative history to the statements that tend to show whether the congressional purpose was to forbid the challenged publication. For example, Senator Taft, the Chairman of the Committee on Labor and Public Welfare, and one of the conferees for the Senate, answered inquiries as follows (93 Cong. Rec. 6437, 6438, 6440):

> "Mr. BARKLEY. Suppose the particular publication referred to by the Senator from Florida is published and paid for by subscriptions paid to the publication by the membership of that railway labor organization?
>
> "Mr. TAFT. That will be perfectly lawful. That is the way it should be done.
>
> "Mr. BARKLEY. And suppose it is not paid for by union funds collected from the various labor unions?
>
> "Mr. TAFT. That will be perfectly proper.
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> . . . . .
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> "Mr. BARKLEY. The Senator from Ohio referred to the law prohibiting the making of direct or indirect

contributions by corporations as a justification for making the same provision in the case of labor unions. Let us consider the publication of a corporation which, day after day, takes a position against one candidate and in favor of another candidate, and does so in its editorials. The editorials occupy space in that newspaper or publication, and the space costs a certain amount of money. Is that a direct or an indirect contribution to a campaign; and if it is neither, what is it?

"Mr. TAFT. I would say that is the operation of the newspaper itself.

"Mr. BARKLEY. That is true; it is the operation of the newspaper. But I gathered the impression that in referring to the present law prohibiting the making of contributions, directly or indirectly by corporations, the Senator inferred that if a corporation publishes a newspaper—as most of them do—and uses the editorials in that publication in advocacy of or opposition to any candidate, at least that is a direct contribution to the campaign. It could not be anything else.

"Mr. TAFT. I do not think it is either a direct or an indirect contribution. I do not think it is an expenditure of the sort prohibited, because it seems to me it is simply the ordinary operation of the particular corporation's business.

. . . . .

"Mr. BARKLEY. Mr. President, let me ask the Senator this question: Let us suppose a labor organization publishes a newspaper for the information and benefit of its members, and let us suppose that it is published regularly, whether daily or weekly or monthly, and is paid for from a fund created by the payment of dues into the organization it represents. Let us assume that the newspaper is not sold

on the streets, and let us assume further that a certain subscription by the month or by the year is not charged for the newspaper. Does the Senator from Ohio advise us that under this measure such a newspaper could not take an editorial position with respect to any candidate for public office, without violating this measure?

"Mr. TAFT. If it is supported by union funds, I do not think it could. If the newspaper is prepared and distributed and circulated by means of the expenditure of union funds, then how could a line be drawn between that and political literature or pamphlets or publications of that nature? It is perfectly easy for a labor union to publish lawfully a bona fide newspaper and to charge subscriptions for that newspaper, either by itself or as a corporation.

. . . . .

"Mr. BALL. In the case of most union papers, as I understand, the subscriptions from the union members are collected along with the dues, but they are an earmarked portion of the dues which the union collects and remits to the paper in the form of subscriptions. I take it that would be in a different category from the case where the union makes a blanket subscription and an appropriation out of union dues.

"Mr. TAFT. I think if the paper is, so to speak, a going concern, it can take whatever position it wants to.

. . . . .

"Mr. MAGNUSON. Teamsters' unions publish newspapers dealing with matters in which such unions are interested. The same is true of many other unions. If the pending measure becomes a law, from now on such unions will be prohibited from advo-

cating in their newspapers the support of any political candidates.

"Mr. TAFT. That is correct, unless they sell the papers they publish to their members, if the members desire to buy them. In such a case there would be no expenditure for such a purpose of union funds.

. . . . .

"Mr. MAGNUSON. Mr. President, if the Senator will yield, let me ask him another question. All the funds of labor unions come from dues paid by their members. All the activities of the unions are based upon expenditure of funds provided by dues. That money is in the union's treasury. If the pending bill should become law it would mean that all labor organs which are now in existence would, from now on, be prohibited from participating in a campaign, favoring a candidate, mentioning his name, or endorsing him for public office?

"Mr. TAFT. No; I do not think it means that. The union can issue a newspaper, and can charge the members for the newspaper, that is, the members who buy copies of the newspaper, and the union can put such matters in the newspaper if it wants to. The union can separate the payment of dues from the payment for a newspaper if its members are willing to do so, that is, if the members are willing to subscribe to that kind of a newspaper. I presume the members would be willing to do so. A union can publish such a newspaper, or unions can do as was done last year, organize something like the PAC, a political organization, and receive direct contributions, just so long as members of the union know what they are contributing to, and the dues which they pay into the union treasury are not used for such purpose."

Senator Ellender, also one of the conferees, made this statement:

> "May I say to the Senator from Florida it is only in the event that union funds are used for political contributions that a union becomes liable. Mr. Green can talk all he wants to, if he pays for his own time or if the members of the union desire to make individual contributions for such a purpose. For another thing, most unions operate and manage newspapers, and the most of them are maintained by advertisements or by subscriptions from members of the union and from other sources. The proceeds from such newspapers are not union funds. In such cases these newspapers can print anything they desire, and they will not violate the law, so long as union funds are not used to pay for the operation of those newspapers for political purposes." 93 Cong. Rec. 6522.

Application.—With this summary of the development of and quotation of excerpts from discussion in Congress concerning § 313, we turn to its interpretation and a determination as to whether it covers the circumstances charged in the indictment. Some members of the Court, joining in this opinion, do not place the reliance upon legislative history that this opinion evidences, but reach the same conclusion without consideration of that history. From what we have previously noted, it is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment. It did not want to pass any legislation that would threaten interferences with the privileges of speech or press or that would undertake to supersede the Constitution. The obligation rests also upon this Court in construing congressional enactments to

take care to interpret them so as to avoid a danger of unconstitutionality.[20]

If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.[21] In so far as some of the many statements made on the floor of Congress may indicate the thought, at the time, by certain members of Congress that the language of § 313

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[20] *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407–408:

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407."

Federal Trade Comm'n v. *American Tobacco Co.*, 264 U. S. 298, 307; *Missouri P. R. Co.* v. *Boone*, 270 U. S. 466, 471–72; cf. *Blodgett* v. *Holden*, 275 U. S. 142, 147.

[21] Compare "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve." *Pennekamp* v. *Florida*, 328 U. S. 331, 346.

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great,

carried a restrictive meaning in conflict with that which we have adopted, we hold that the language itself, coupled with the dangers of unconstitutionality, supports the interpretation which we have placed upon it.

When Congress coupled the word "expenditure" with the word "contribution," it did so because the practical operation of § 313 in previous elections showed the need to strengthen the bars against the misuse of aggregated funds gathered into the control of a single organization from many individual sources. Apparently "expenditure" was added to eradicate the doubt that had been raised as to the reach of "contribution," not to extend greatly the coverage of the section.[22] One can find indications in the exchanges between participants in the debates that informed proponents and opponents thought that § 313 went so far as to forbid periodicals in the regular course of publication from taking part in pending elections where there was not segregated subscription, advertising or sales moneys adequate for its support. Of course, a periodical financed by a corporation or labor union for the purpose of advocating legislation advantageous to the sponsor or supporting candidates whose views are believed to coincide generally with those deemed advantageous to such organization is on a different level from newspapers devoted solely to the dissemination of news but the line separating the two classes is not clear. In the absence of definite statutory demarcation, the location of that line must await the full development of facts in individual cases. It is one thing to say that trade or

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the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 529–30.

"For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges* v. *California*, 314 U. S. 252, 263.

[22] 93 Cong. Rec. 6436, 6437, 6439.

labor union periodicals published regularly for members, stockholders or purchasers are allowable under § 313 and quite another to say that in connection with an election occasional pamphlets or dodgers or free copies widely scattered are forbidden. Senator Taft stated on the Senate floor that funds voluntarily contributed for election purposes might be used without violating the section and papers supported by subscriptions and sales might likewise be published.[23] Members of unions paying dues and stockholders of corporations know of the practice of their respective organizations in regularly publishing periodicals. It would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication. It is unduly stretching language to say that the members or stockholders are unwilling participants in such normal organizational activities, including the advocacy thereby of governmental policies affecting their interests, and the support thereby of candidates thought to be favorable to their interests.

It is our conclusion that this indictment charges only that the CIO and its president published with union funds a regular periodical for the furtherance of its aims, that President Murray authorized the use of those funds for distribution of this issue in regular course to those accustomed to receive copies of the periodical and that the issue with the statement described at the beginning of this opinion violated § 313 of the Corrupt Practices Act.

We are unwilling to say that Congress by its prohibition against corporations or labor organizations making an "expenditure in connection with any election" of candidates for federal office intended to outlaw such a publica-

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[23] See 93 Cong. Rec. 6437–40.

tion. We do not think § 313 reaches such a use of corporate or labor organization funds. We express no opinion as to the scope of this section where different circumstances exist and none upon the constitutionality of the section.

Our conclusion leads us to affirm the order of dismissal upon the ground herein announced.

It is so ordered.

MR. JUSTICE FRANKFURTER, concurring.

In a government operating under constitutional limitations there are obvious advantages in knowing at once the legal powers of the government. The desire to secure these advantages explains the strong efforts of some of the ablest members of the Philadelphia Convention to associate the judiciary through a Council of Revision in the legislative process.[1] The efforts failed, because the disadvantages of such a role by the judiciary were deemed greater than the advantages. And it cannot be too often recalled that the first Chief Justice and his Associates felt constrained to withhold even from the Father of his Country answers to questions regarding which Washington was most anxious to have illumination from the Supreme Court, pertaining as they did to the President's powers during the Napoleonic conflict. See 3 Johnston, Correspondence and Public Papers of John Jay (1891) 486–89, and 10 Sparks, Writings of Washington (1847) 542–45; and see Thayer, Legal Essays (1908) 53–54.

Accordingly, the fact that it would be convenient to the parties and the public to know promptly whether a statute is valid, has not affected "rigid insistence" on limiting adjudication to actual "cases" and "controversies." To that end the Court has developed "for its own gov-

[1] See 1 Farrand, The Records of the Federal Convention of 1787 (1911) 21, 28, 94, 97 *et seq.*, 105, 107, 109, 110, 111 *et seq.*, 131, 138, 141, 144–45; 2 *id.* 71, 73 *et seq.*, 294–95, 298 *et seq.*

ernance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 345, 346. See also, more recently, *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450; *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129; *United Public Workers of America* v. *Mitchell,* 330 U. S. 75; *Rescue Army* v. *Municipal Court,* 331 U. S. 549.

A case or controversy in the sense of a litigation ripe and right for constitutional adjudication by this Court implies a real contest—an active clash of views, based upon an adequate formulation of issues, so as to bring a challenge to that which Congress has enacted inescapably before the Court. The matter was thus put by an authoritative commentator: "The determination of constitutional questions has been associated with the strictly judicial function and so far as possible has been removed from the contentions of politics. These questions have been decided after full argument in contested cases and it is only with the light afforded by a real contest that opinions on questions of the highest importance can safely be rendered." Charles Evans Hughes, The Supreme Court of the United States (1928) 32. Time has not lessened the force of the reason for this requirement of abstention as indicated by Chief Justice Marshall: "No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed." *Ex parte Randolph,* 20 Fed. Cas. No. 11,558 at 254, 2 Brock. 447, 478–79 (C. C. D. Va. 1833).

In order that a contest may fairly invite adjudication it is not necessary that the parties should be personally inimical to one another. On the other hand, the fact that the outward form of a litigation has not been contrived by pre-arrangement of the parties does not preclude want of a real contest which is essential to this Court's exercise of its function, one of "great gravity and delicacy," in passing upon the validity of an act of Congress. *Ashwander* v. *Tennessee Valley Authority, supra,* at 345 and cases cited in footnote 3. This prerequisite may be lacking though there be entire disinterestedness on both sides in their desire to secure at the earliest possible moment an adjudication on constitutional power. It may be lacking precisely because the issues were formulated so broadly as to bring gratuitously before the Court that for which there is no necessity for decision, or because they invite formulation of a rule of constitutional law broader than is required by the precise facts of the situation or the terms of the assailed legislation. See *Liverpool, N. Y. and Phila. S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39; see also, Statement of the United States of America as Amicus Curiae, in *Burco, Inc.* v. *Whitworth,* 297 U. S. 724; Government's Brief in *Landis* v. *North American Co.,* 299 U. S. 248.

We are concerned here not with derogatory implications of collusion, nor have we a case of mootness with its technical meaning of a non-existent controversy. The circumstances bring the present record within those considerations which have led this Court in the past "for its own governance in the cases confessedly within its jurisdiction" to avoid passing on grave constitutional questions because the questions involving the power of Congress come here not so shaped by the record and by the proceedings below as to bring those powers before this Court as leanly and as sharply as judicial judgment upon an exercise of congressional power requires.

This case is here under the unique jurisdiction of the Criminal Appeals Act of 1907, as amended, whereby decisions of District Courts raise almost abstract questions of law regarding the invalidity or construction of criminal statutes, in that they do not come here in the setting of normal adjudications on the merits of a controversy. Compare *United States* v. *Petrillo,* 332 U. S. 1, with the subsequent adjudication on the merits in *United States* v. *Petrillo,* 75 F. Supp. 176. It is most important that such a decision result from due weighing of the considerations which alone can justify the invalidation of an Act of Congress. This implies that there be presented to a District Court the most effective and the least misapprehending legal grounds for supporting what Congress has enacted, while at the same time constitutional adjudication is sedulously resisted by presenting to the District Court alternative constructions of what Congress has written so as to avoid, if fairly possible, invalidation of the statute. The decision of the District Court in this case comes to us wanting in both respects.

According to the District Court, the Government conceded that § 304 of the Taft-Hartley Act is an abridgment of "rights guaranteed by the First Amendment" but contended that "Congress has power under Article I, Section 4, of the Constitution to abridge First Amendment rights if it considers such a course necessary in maintaining the purity and freedom of elections." This representation of the Government's argument below is made in the opinion of the District Court not once, not twice, but thrice.[2] At the bar of this Court it was urged on behalf of the Government that the District Court misconceived the arguments of the Government, that what

[2] 1. "The government concedes that rights guaranteed by the First Amendment are abridged by the prohibition against expenditures by labor organizations in connection with elections; but it says that Congress has power under Article I, Section 4, of the Constitution

the District Court attributed to the Government is not what the Government argued below. But ordinary English words have lost all meaning if the District Judge does not say unequivocally and three times that that is what the Government has argued. It cannot be whistled away as a gauche manner of saying that inasmuch as utterance may under certain circumstances be restricted, § 304 is *not* in violation of the First Amendment. That may have been the argument put to the court below, but plainly enough that court did not so understand it. Who is to say how the lower court would have dealt with the problem of constitutionality before it, if the argument had been pitched differently than in the way in which it reached the court, or if the court's misapprehension had been corrected? No effort was made, by the familiar process of a petition for rehearing or for a clarification of the court's opinion, to see to it that the lower court manifested an understanding of the Government's contentions by not attributing an erroneous position to the Government. (See, for instance, petition for rehearing in *Morgan* v. *United States,* 304 U. S. 1, 23.)

Again, the defendants did not urge below, as is ordinarily the way of defendants, a construction of the statute

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to abridge First Amendment rights if it considers such a course necessary in maintaining the purity and freedom of elections."

"Thus the Court is confronted with the necessity of passing on the validity of Section 304 of the Act, insofar as it relates to expenditures by labor organizations in connection with federal elections."

2. "It is insisted by the government that Congress could abridge the freedoms guaranteed by the First Amendment (which the government concedes was done here) because of its constitutional control over the manner of holding elections, and its consequent power to prevent corruption therein, and to secure clean elections."

3. "In support of its argument that congressional control over elections may be exercised in abridgment of rights protected by the First Amendment, the government points to the case of United Public Workers v. Mitchell, 330 U. S. 75."

which would afford them the rights they claim—but would secure those rights not by declaring an Act of Congress unconstitutional but by an appropriate restriction of its scope. On its own motion, this Court now gives a construction to the statute which takes the conduct for which defendants were indicted out of the scope of the statute without bringing the Court into conflict with Congress. Who can be confident that such a construction, which salvages the statute and at the same time safeguards the constitutional rights of the defendants, might not have commended itself to the District Court and eventually brought a different case, if any, before this Court for review?

I cannot escape the conclusion that in a natural eagerness to elicit from this Court a decision at the earliest possible moment, each side was at least unwittingly the ally of the other in bringing before this Court far-reaching questions of constitutionality under circumstances which all the best teachings of this Court admonish us not to entertain.

But since my brethren find that the case calls for adjudication, I join in the Court's opinion. I do so because of another rule of constitutional adjudication which requires us to give a statute an allowable construction that fairly avoids a constitutional issue. See my dissenting opinion in *Shapiro* v. *United States, ante,* p. 36, decided this day.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join, concurring in the result.

If § 313 as amended [1] can be taken to cover the costs of any political publication by a labor union, I think it com-

[1] Section 313 of the Corrupt Practices Act, as amended by § 304 of the Labor Management Relations Act of 1947, 61 Stat. 159.

prehends the "expenditures" made in this case. By reading them out of the section, in order not to pass upon its validity, the Court in effect abdicates its function in the guise of applying the policy against deciding questions of constitutionality unnecessarily.[2] I adhere to that policy. But I do not think it justifies invasion of the legislative function by rewriting or emasculating the statute. This in my judgment is what has been done in this instance. Accordingly I dissent from the construction given to the statute and from the misapplication of the policy. I also think the statute patently invalid as applied in these circumstances.

I.

The Court's interpretation of the section and the indictment are not entirely clear to me. But, as I understand the ruling, it is only that § 313 does not forbid labor unions to take part in pending elections[3] by publishing and circulating newspapers in regular course among their membership, although the costs of publication are paid from the union's general funds regardless of their source, *i. e.*, whether from subscriptions, advertising revenues and returns from per copy sales, or from union dues and other sources.

The line of coverage is marked without reference to the source from which the union derives the funds so

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[2] *Rescue Army* v. *Municipal Court*, 331 U. S. 549; *Ashwander* v. *Valley Authority*, 297 U. S. 288, concurring opinion of Mr. Justice Brandeis at 346–348; *Federation of Labor* v. *McAdory*, 325 U. S. 450; *United Public Workers* v. *Mitchell*, 330 U. S. 75.

[3] The statutory wording is: ". . . expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . ."

expended,[4] but by whether others than members of the union receive free copies of the publication; and by whether the publication is "in regular course" or only in casual or occasional distributions. Apparently, in the latter event, circulation limited to the membership would fall within the prohibition as well as free (and perhaps also paid) distribution outside that circle.

The construction therefore comes down to finding that Congress did not intend to forbid these expenditures, though made from union funds, since they were made: (1) to sustain the publication of the union's political views; (2) in the regular course of publishing and distributing a union newspaper; (3) with distribution limited substantially[5] to union members and not including outsiders. It is because applying § 313 to this type of expenditure would raise "the gravest doubt" of the section's constitutionality that the Court holds the section inapplicable.

If such an interpretation were tenably supportable on any other basis, I should be in accord with this happy solution. But neither the language of the section nor its history affords such a basis, unless indeed it may be

[4] The indictment explicitly charges that "The CIO News" was regularly (weekly) published by the C. I. O. and costs of publication and distribution, including the issue in question, were paid from the union's funds. There was no allegation concerning their source, whether from revenues not connected with or earmarked for receipt of the paper or from sources specifically so connected. The Court's opinion does not, nor could it fairly, assume that the allegations were limited to expenditure of funds derived from subscriptions, advertising revenues or returns from per copy sales. The opinion explicitly holds that source of the funds is immaterial under § 313 for coverage of the type of publication and circulation here involved.

[5] By the opinion's phrase, "in regular course to those *accustomed to receive copies*," p. 123, *ante* (emphasis added), room seems to be left for the inference that insubstantial distribution outside the membership would not tend to bring the case within the section's terms.

that the wording is so broad, comprehensive, and indefinite that any possible construction which would apply to a union's publication of its political views would be subject to equally grave constitutional doubt, and therefore was not intended to be covered.

Indeed, so far as the present opinion concludes, that may be the case. For it does not hold that distribution outside the circle of membership, even in regular course, is forbidden or, if so, the prohibition would be constitutionally permissible. Neither does it rule that either consequence would follow from casual or occasional distribution within or without that circle. At the most it is indicated that the section more probably or possibly covers those situations than the one now eliminated. But there seems to be no corresponding intimation that the section would be valid in such coverage.

In fact the opinion points to no situation, relating to a union's expression of political views, which certainly could be taken as included and validly so. This, of course, comes down to excluding the present circumstances, not to save the statute because there are other applications clearly and validly covered, but because there are such applications which may or may not be covered and which, if covered, may be equally or nearly as doubtful constitutionally. Such a course of construction, if followed in each instance of indictment on particular facts, would mean that the section could not apply in any instance of publication, because each would present "the gravest doubt" of constitutionality and therefore would be excluded.

The language of § 313, as amended, is sweepingly comprehensive. Insofar as presently pertinent it forbids labor unions as well as corporations ". . . to make a contribution or *expenditure in connection with* any election at which . . . [the designated federal officers] [6] are to be

[6] See note 3. The section as presently effective is quoted in full at note 1 of the Court's opinion.

voted for," including primaries, conventions or caucuses held to select such candidates. (Emphasis added.)

The crucial words are "expenditure" and "in connection with." Literally they cover any expenditure whatever relating at any rate to a pending election, and possibly to prospective elections or elections already held. The broad dictionary meaning of the word "expenditure" takes added color from its context with "contribution." The legislative history is clear that it was added by the 1947 amendment expressly to cover situations not previously included within the accepted legislative interpretation of "contribution." [7] The coloration added is therefore not restrictive; it is expansive. See note 9. And in the absence of any indication of restriction, light on

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[7] "Contribution" had been construed by legislative committees investigating campaign expenditures prior to 1947, see notes 9 and 10, though not always unanimously, not to cover expenditures made by labor unions in publishing their political views during campaigns or at other times. See H. R. Rep. No. 2093, 78th Cong., 2d Sess. 10–11; Sen. Rep. No. 101, 79th Cong., 1st Sess. 57–59, 83–84; H. R. Rep. No. 2739, 79th Cong., 2d Sess. 39–40, 46; Sen. Rep. No. 1, Part 2, 80th Cong., 1st Sess. 37, 38–39. It is not necessary to summarize the differing viewpoints expressed in the 1947 debates concerning the validity of this construction. Whether valid or not would make only the difference between extending the statute's scope by adding to its terms or by "plugging a loophole," albeit a large one, created by misconstruction. In either event a large addition to the section's coverage was made. See, *e. g.*, 93 Cong. Rec. 6438–6440.

The Federal Corrupt Practices Act of 1925, 43 Stat. 1070, amended the preexisting legislation forbidding a corporate "money contribution" by changing that term to "contribution" and defining this to include "a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution . . . ." Since "expenditure" was intended to broaden "contribution" in the 1947 amendment of § 313, it would seem that its scope could hardly be less broad than was given by the 1925 Act's definition to "contribution," although the Government does not appear to urge that "expenditure" incorporates that definition.

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the scope of coverage can be found only in the legislative history.

When one turns to that source, he finds a veritable fog of contradictions relating to specific possible applications,[8] contradictions necessarily bred among both proponents and opponents of the amendment from the breadth and indefiniteness of the literal scope of the language used. But in one important respect the history again is clear, namely, that the sponsors and proponents had in mind three principal objectives.

These were: (1) To reduce what had come to be regarded in the light of recent experience as the undue and disproportionate influence of labor unions upon federal elections; (2) to preserve the purity of such elections and of official conduct ensuing from the choices made in them against the use of aggregated wealth by union as well as corporate entities; and (3) to protect union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views.[9] Shortly,

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[8] See 93 Cong. Rec. 6436–6441, 6446–6448, and excerpts quoted in the Court's opinion and the appendix to this one. Cf. also notes 11, 12, 13.

[9] These were the objects of the prohibition against "contributions" by labor unions, which first appeared on a temporary basis in 1943 in the War Labor Disputes Act, which by its terms was to expire six months following the termination of hostilities. Act of June 25, 1943, c. 144, § 9, 57 Stat. 167. See Hearings before a Subcommittee of the Committee on Labor on H. R. 804 and H. R. 1483, 78th Cong., 1st Sess. 2, 4, 117, 118, 133. Cf. 89 Cong. Rec. 5328, 5334, 5792. The Government's brief states that the legislative history of the 1943 Act shows that the principal basis of the extension to labor unions, like that of the same and earlier acts applying to corporations, "was the securing of elections in accordance with the will of the people through removing disproportionate influences exerted by means of large aggregations of money."

Since the 1947 amendment to § 313 was designed to make permanent the prohibitions of the 1943 Act, H. R. Rep. No. 245, 80th Cong., 1st Sess. 46; H. R. Rep. No. 510, 80th Cong., 1st Sess. 67–68

these objects may be designated as the "undue influence," "purity of elections," and "minority protection" objectives. They are obviously interrelated, but not identical. And the differences as well as their combination become important for deciding the scope of the section's coverage and its validity in specific application.

With those objects in mind as throwing light on the section's coverage under the broad language employed, we turn to the legislative history on that subject. The Government centers the discussion, both on coverage and on constitutionality, around the "minority protection" objective. And the legislative discussion, taking place almost exclusively in the Senate and dominated largely by the Labor Management Act's sponsor in that body, also took this purpose as the central theme.[10]

The discussion ranged around a great variety of possible specific applications,[11] with concentration upon both

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(Conference report to accompany H. R. 3020), and to expand them by adding "expenditures," the objects of the 1943 Act necessarily were carried forward into the 1947 amendment. *Ibid.* See also 93 Cong. Rec. 3428.

[10] Congressional committees investigating campaign expenditures in 1946 and 1947 had recommended that "expenditures" be added to the prohibition of § 313. See H. R. Rep. No. 2739, 79th Cong., 2d Sess. 39–40, 46; Sen. Rep. No. 1, Part 2, 80th Cong., 1st Sess. 37, 38–39. The so-called Taft-Hartley Bill as introduced in the House contained the prohibition, H. R. 3020, 80th Cong., 1st Sess., § 304, while the Senate version did not. S. 1126, 80th Cong., 1st Sess. There was apparently little discussion in either body on the matter until the conference report incorporating the provision was made. H. R. Rep. No. 510, 80th Cong., 1st Sess. Then lengthy discussion ensued in the Senate, from which excerpts are quoted in the Court's opinion and in the appendix to this one. See 93 Cong. Rec. 6436–6441, 6445-6448, 6522–6524, 6530.

[11] Some of the more important instances included whether the section applies to forbid political comment or information "in connection with" elections by corporately owned newspapers and periodicals, in regular course of distribution, 93 Cong. Rec. 6436, or in special editions, *ibid.*; by "house organs," *id.* 6440, or like publications put

the scope and the validity of the provision. The Senate sponsor responded to a flood of inquiries with candor and so far as possible with precision and certainty concerning particular situations under his view of the section's criterion,[12] although in numerous instances he was equally candid in stating doubt or disability to give positive opinions, at times in the absence of further facts.[13]

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out by corporations engaging primarily in other business than publishing; by religious, *ibid.*, and charitable corporations; by organizations like the Anti-Saloon League, *ibid.;* by radio commentators sponsored by commercial corporations, *id.* 6439, 6447; by trade associations, such as the National Association of Manufacturers, which receive funds from constituent corporations, *id.* 6438.

These inquiries generally proceeded with analogous ones relating to comparable activities of unions and comparable responses, touching for example P. A. C. activities; labor publications, regular or special; sponsored broadcasts, etc. Illustrative responses are set forth in note 12.

[12] *E. g.,* the regular corporately owned press was considered not covered as to its ordinary circulation, because "that is the operation of the newspaper itself," 93 Cong. Rec. 6437. The same exemption from coverage, however, was thought not to extend to regularly published union or labor papers, since members' dues could not be so used without specific earmarking or designation by each for such use, even though from previous practice they might know such use would be made. *Id.* 6440. On the other hand, neither the regular press, corporately owned, nor union papers could publish special editions or distribute them with or without charge. Nor could house organs, union or corporate, comment politically, or religious organizations, if incorporated; neither could associations like the National Association of Manufacturers, which receive funds from corporations and by such expenditures would be making "contributions" indirectly. Problems involving organizations like the Anti-Saloon League and sponsored radio broadcasts, whether by unions or corporations, as well as guest appearances of candidates and others supporting them on sponsored radio programs, raised matters of greater difficulty. See the various pertinent citations in note 11. Cf. notes 13 and 14.

[13] The problems raised in connection with radio discussions presented particularly dubious situations, frequently admitted to call

What is most significant for the question of coverage, however, and for the Court's construction in this case, is the fact that in making his responses to the numerous and varied inquiries he tested coverage invariably or nearly so by applying the very criterion the Court now discards, namely, the source of the funds received and expended in making the political publication.

That is, in his view that the primary purpose of the amendment was "minority protection," the line drawn by the section was between expenditure of funds received by the union expressly for the purpose of the publication and earmarked for that purpose and, on the other hand, expending funds not so limited by the person or source supplying them.[14] There was strong opposition to the

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for further facts, to present questions of fact, and to require fine lines of distinction. See, *e. g.*, 93 Cong. Rec. 6439, 6440.

Difficulty arose and doubt was expressed also over what would constitute political comment, *e. g.*, publishing an incumbent candidate's voting record, *id.* 6438, 6446, 6447, an instance in which the Senate sponsor at first disagreed with Senator Ball, but later apparently though somewhat equivocally agreed with him that publication of the record without comment further than "merely a bare statement of actual facts and simply direct quotations of what the man had said in the course of certain speeches on certain subjects" would not be forbidden, *id.* 6447; corporate broadcasts not for or against a candidate, but for a party or relating to issues in the election, said to be "again, a question of fact" and to depend on "how close it is to the election." *Ibid.* These instances are illustrative only, not comprehensive. Cf. note 29.

[14] This rubric turned the answers to the inquiries and situations mentioned in notes 11, 12 and 13, as indeed to all others. If the funds used for the publication came to the corporate or union treasury without securing the contributor's express consent for that use, the organization could not so apply them; if so contributed, they could be thus employed. Except in the case of the regular corporate press which presumably was not covered as to ordinary circulation, cf. note 12 *supra*, expenditure of any corporate or union funds not derived from operation of the publication, *e. g.*, from adver-

provision and spirited exchange between proponents and critics of the measure concerning its wisdom and its constitutionality. But there was no disagreement among them that the sponsor's test was the intended criterion. Indeed the legislative discussion was stated explicitly to be for the purpose of making plain beyond any question that this was so.[15] Although there were many differences over whether specified types of activity would fall under the criterion's ban and doubts concerning others, the purpose succeeded. There was no divergence from the view that political comment by a union paper or other instrumentality using nonsegregated funds was within the section's coverage. When this was the source of the expenditure it violated the intended prohibition of the section whether or not the publication was in regular course and whether or not it went to others than members and persons accustomed to receive it.

If therefore the sponsor's steadfast view can have weight to determine the coverage of a statute indefinite in its terms, *Wright* v. *Vinton Branch,* 300 U. S. 440; *United States* v. *Dickerson,* 310 U. S. 554; *United States* v. *American Trucking Assns.,* 310 U. S. 534; *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110, this case is brought squarely within the prohibition of § 313. This is conclusively established by the excerpts from the legislative discussion quoted in the Court's opinion. Others to the same effect are added to this one as an appendix.

Moreover in his message vetoing the Labor Management Relations Act of 1947 the President stated that § 313 "would prevent the ordinary union newspaper from commenting favorably or unfavorably upon candidates or issues in national elections." H. R. Doc. No. 334, 80th

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tising revenues or returns from per copy sales, or funds received from individuals without individual and explicit authorization for the purpose of the publication was forbidden.

[15] See the appendix to this opinion, *post,* p. 156.

Cong., 1st Sess. 9. In the debate preliminary to the overriding of the veto, none of the legislators in charge of the measure gave any indication that they differed with the President's interpretation. Nor could they have differed, for the statement in the veto message gave effect to their clearly expressed views as to the section's coverage in the specific instance stated.

Thus, in the face of the legislative judgment, reiterated after veto, and of the Chief Executive's in making his veto, this Court sets aside the one clearly intended feature of the statute apart from its general objectives. I doubt that upon any matter of construction the Court has heretofore so far presumed to override the plainly and incontrovertibly stated judgment of all participants in the legislative process with its own tortuously fashioned view. This is not construction under the doctrine of strict necessity. It is invasion of the legislative process by emasculation of the statute. The only justification for this is to avoid deciding the question of validity.

II.

We are concerned in this case with the constitutionality of § 313 as amended only insofar as it may be applied in restriction or abridgment of the rights of freedom of speech, press and assembly secured by the First Amendment.[16] Other applications are not in question. There can be little doubt of Congress' power to regulate the making of political contributions and expenditures by labor unions, as well as by other organizations and individuals, in the interest of free and pure elections and the prevention of official corruption, by appropriate measures not trenching on those basic rights. But when regulation

[16] Since the statute in my judgment abridges those freedoms here, it is unnecessary to consider other groundings urged for its invalidation.

or prohibition touches them, this Court is duty bound to examine the restrictions and to decide in its own independent judgment whether they are abridged within the Amendment's meaning.[17] That office cannot be surrendered to legislative judgment, however weighty, although such judgment is always entitled to respect.

As the Court has declared repeatedly, that judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency.[18] The presumption rather is against the legislative intrusion into these domains. For, while not absolute, the enforced surrender of those rights must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly. Hence doubtful intrusions cannot be allowed to stand consistently with the Amendment's command and purpose,[19] nor therefore can the usual presumptions of constitutional validity, deriving from the weight of legislative opinion in other matters more largely within the legislative province and special competence, obtain. It is in the light and spirit of these principles that the validity

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[17] *Thomas* v. *Collins,* 323 U. S. 516, 531; *Board of Education* v. *Barnette,* 319 U. S. 624, 639; *Thornhill* v. *Alabama,* 310 U. S. 88, 96; *Schneider* v. *State,* 308 U. S. 147, 161.

[18] *Thomas* v. *Collins,* 323 U. S. 516, 530; *Thornhill* v. *Alabama,* 310 U. S. 88, 95; *Schneider* v. *State,* 308 U. S. 147, 161; cf. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, n. 4.

[19] *Thomas* v. *Collins,* 323 U. S. 516, 530; and cf. other cases cited in note 17.

of § 313 as claimed to be applicable here must be determined.

At the outset the Government admits that § 313, in prohibiting expenditures in connection with any federal election, does "bring into play" the rights of freedom of speech, press and assembly. This is a necessary consequence of its construction of the section and the presently attempted application. But it is claimed no unconstitutional abridgment is involved. This, because it is said Congress has power to act to preserve the freedom and purity of federal elections under Art. I, § 4, of the Constitution,[20] and of official action. Thus it is claimed the First Amendment's guaranties are balanced by this other constitutional provision; and Congress' exercise of the authority granted by it is entitled to the same weight and presumptive validity in placing limits upon the freedoms as attaches in their favor in other connections. Accordingly, the usual preeminence accorded to the First Amendment liberties disappears, it is said, and the legislative judgment, having rational basis in fact and policy, becomes controlling.

Apart from the question whether the same argument might not be applicable to all other powers granted to Congress by the Constitution, to destroy the principles stated for securing the preferential status of the First Amendment freedoms, the argument ignores other equally settled corollary principles. These are that statutes restrictive of or purporting to place limits to those freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb, *Cantwell* v. *Connecticut,* 310 U. S.

[20] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

See also U. S. Const., Art. I, § 2, clause 1, § 8, clause 18. Cf. as to Congress' power over the electoral process, *Ex parte Yarbrough,* 110 U. S. 651; *United States* v. *Classic,* 313 U. S. 299.

296; *Thornhill* v. *Alabama,* 310 U. S. 88; *Schneider* v. *State,* 308 U. S. 147; *De Jonge* v. *Oregon,* 299 U. S. 353; *Saia* v. *New York,* 334 U. S. 558, and that the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation. Blurred signposts to criminality will not suffice to create it. *Cantwell* v. *Connecticut, supra; Stromberg* v. *California,* 283 U. S. 359; cf. *Thomas* v. *Collins,* 323 U. S. 516; *Winters* v. *New York,* 333 U. S. 507.

Section 313 falls far short of meeting these requirements, both in its terms and as infused with meaning from the legislative history. This is true whether the section is considered in relation to one or another of the evils said to be its targets or with reference to all of them taken together.

If the evil is taken to be the corruption of national elections and federal officials by the expenditure of large masses of aggregated wealth in their behalf, the statute is neither so phrased nor so limited, even in its legislative construction. Indeed the Government does not explicitly argue corruption *per se* arising from union expenditures for publication in the same sense as gave rise to the original and later legislation against corporate contributions down to the War Labor Disputes Act of 1943. And very little in the legislative history directly suggests this evil, although there are inferences implicit in some statements that it was not entirely out of mind.[21] So also with the Government's argument.[22]

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[21] As has been noted, the Senate debate went largely on the "minority protection" basis of justification with only inferential or incidental reference to corrupting influence and occasional suggestions of "undue influence." See, however, the statements of Representative Hoffman, 93 Cong. Rec. 3428, and of Senator Taft, *id.* 6437.

[22] The brief, however, includes among the reasons for the prohibition of § 313 "A distrust of the use of large contributions, not

The Government stresses the "undue influence" of unions in making expenditures by way of publication in support of or against candidates and political issues involved in the campaign rather than corruption in the gross sense. It maintains that large expenditures by unions in publicizing their official political views bring about an undue, that is supposedly a disproportionate, sway of electoral sentiment and official attitudes. In short, the "bloc" power of unions has become too great, in influencing both the electorate and public officials, to permit further expenditure of their funds in directly and openly publicizing their political views. And the asserted evil is to be uprooted by prohibition of union expenditures as such, not by regulation specifically drawn to meet it.

There are, of course, obvious differences between such evils and those arising from the grosser forms of assistance more usually associated with secrecy, bribery and corruption, direct or subtle. But it is not necessary to stop to point these out or discuss them, except to say that any asserted beneficial tendency of restrictions upon expenditures for publicizing political views, whether of a group or of an individual, is certainly counterbalanced to some extent by the loss for democratic processes resulting from the restrictions upon free and full public discussion. The claimed evil is not one unmixed with good. And its suppression destroys the good with the bad unless precise measures are taken to prevent this.

The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it. Moreover, to an extent not necessary now to attempt delimiting, that right is secured by the guaranty of freedom of

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because these prove corruption, but because the large single contributions imply resulting obligations and, therefore, can breed corruption"; and goes on to state that "there is no practical difference between a contribution and an expenditure so far as the effect of the use of money for campaign purposes is concerned."

assembly, a liberty essentially coordinate with the freedoms of speech, the press, and conscience. Cf. *Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 251–252. It is not by accident, it is by explicit design, as was said in *Thomas* v. *Collins, supra* at 530, that these freedoms are coupled together in the First Amendment's assurance. They involve the right to hear as well as to speak, and any restriction upon either attenuates both.

There is therefore an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free assembly for that purpose.

The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function. To say that labor unions as such have nothing of value to contribute to that process and no vital or legitimate interest in it is to ignore the obvious facts of political and economic life and of their increasing interrelationship in modern society. Cf. *DeMille* v. *American Federation of Radio Artists,* 31 Cal. 2d 137. That ostrichlike conception, if enforced by law, would deny those values both to unions and thus to that extent to their members, as also to the voting public in general. To compare restrictions necessarily resulting in this loss for the public good to others not creating it is to identify essentially different things. The cases are not identical. The loss inherent in restrictions upon expenditures for publicizing views is not necessarily involved in other expenditures.

It is this very difference, of course, which brings into play the First Amendment's prohibitions and the prin-

ciples giving them presumptive weight against intrusions or encroachments upon the area the Amendment reserves against legislative annexation. It is this difference, the very fact that the restriction seeks to contract the boundaries of expression and the right to hear previously considered open, which forces upon its authors the burden of justifying the contraction by demonstrating indubitable public advantage arising from the restriction outweighing all disadvantages, thus reversing the direction of presumptive weight in other cases.

If therefore it is an evil for organized groups to have unrestricted freedom to make expenditures for directly and openly publicizing their political views and information supporting them, but cf. *Bowe* v. *Secretary of the Commonwealth, supra* at 252, it does not follow that it is one which requires complete prohibition of the right. *Ibid.* That is neither consistent with the Amendment's spirit and purpose, *ibid.*, nor essential to correction of the evil, whether it be considered corruptive influence or merely influence of undue or disproportionate political weight.

It is not necessary now to consider whether restricting the rights of individuals, singly or in organized relationships, to publicize their political views, rights often essential to their survival and always to their well-being, can be accommodated, in some instances, with the Amendment's purpose or justified because in legislative judgment those persons, unless restricted, acquire "undue influence" in the electoral process. For "undue influence" in this connection may represent no more than convincing weight of argument fully presented, which is the very thing the Amendment and the electoral process it protects were intended to bring out. And one may question how far legislators may go in accurately assessing undue or disproportionate weight as distinguished from making substantially accurate findings and conclusions concerning corruption.

But even if the right to sway others by persuasion is assumed to be subject to some curtailment, in the interest of preventing grossly unbalanced presentations, that right cannot be wholly denied, *Bowe* v. *Secretary of the Commonwealth, supra* at 252; nor can it be restricted beyond what is reasonably and clearly necessary to correct an evil so gross and immediate that the correction indubitably outweighs the loss to the public interest resulting from the restriction.

Here the restriction in practical effect is prohibition, not regulation, when it is considered with respect to the objects of suppressing corruption and "undue influence." It is not a limitation, it is a prohibition upon expenditure of union funds in connection with a federal election. Unions can act and speak today only by spending money, as indeed is true of nearly every organization and even of individuals if their action is to be effective. As was said in the course of the Senate debates, the interdiction applies to "a dollar, or 50 cents, or $500 or $1,000." 93 Cong. Rec. 6438. There is no showing, legislative or otherwise, of corruption so widespread or of "undue influence" so dominating as could possibly justify so absolute a denial of these basic rights. The statute, whether in terms or as given meaning by the legislative history, is not narrowly drawn to meet the precise evils of corruption or "undue influence," if these were the controlling objects of the legislation. Nor, as will appear, were the restrictions specifically defined, if they can be considered to have been defined at all, so as to leave the union secure and unrestrained in the right to engage in activities within the region of the First Amendment's coverage but not encompassed by the legislation.

As has been stated, it was the "minority protection" idea which became the dominantly stressed one in the Senate debates, although at the most § 313 on its face gave only slight suggestion of this purpose. Nor was

there indication in the section's terms that its prohibition turns on the source from which the funds expended were derived. The language bearing on this was "expenditure in connection with an election" and no more. Literally all union expenditures in that connection were outlawed. There is not a word to suggest that unions could spend their funds in that manner if contributed expressly for the purpose or derived from such sources as advertising revenues, subscriptions, etc., received in connection with publication of a paper in regular course or otherwise. The limitation of the prohibition to funds received generally, *i. e.*, without specific designation for use in political publicity, is almost wholly a construction of the Senate sponsor, so far as appears from the legislative history.

Notwithstanding accepted canons of statutory construction, it certainly would be going far to expect laymen, or even lawyers, to read a statute so lacking in specificity concerning its basic criterion with any semblance of understanding of its limitations.

The lawyer might indeed read the Congressional Record and conclude that the source of the funds used was the crux. But even he would be left in broad and deep doubt whether it would turn multitudinous situations one way or the other. If the section is taken nevertheless to have been intended to draw the sponsor's line of distinction, the restriction it makes remains a drastic one. The effect is not merely one of minority protection. It is also one of majority prohibition. Cf. *DeMille* v. *American Federation of Radio Artists, supra.* Under the section as construed, the accepted principle of majority rule which has become a bulwark, indeed perhaps the leading characteristic, of collective activities is rejected in favor of atomized individual rule and action in matters of political advocacy. *Ibid.* Union activities in political publicity are confined to the use of funds received

from members with their explicit designation given in advance for the purpose.[23] Funds so received from members can be thus expended and no others. Even if all or the large majority of the members had paid dues with the general understanding that they or portions of them would be so used, but had not given explicit authorization, the funds could not be so employed.[24] And this would be true even if all or the large majority were in complete sympathy with the political views expressed by the union or on its behalf with any expenditure of money, however small.

It is true that the union could ask and in many instances secure the required explicit assents. It seems to be suggested that this might be done by expressly designating a specific portion of the dues for political uses, possibly though not at all clearly by by-law or constitutional provision, possibly by earmarking upon statements of dues payable. But it is not made clear whether the member could refuse to pay the earmarked portion and retain membership or would have to pay it to remain in that status. If the latter is true, the section affords little real "minority protection"; if the former, the dissentient is given all the benefit derived from the union's political publicity without having to pay any part of its cost. This is but another of the important and highly doubtful questions raised on the section's wording and construction.

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[23] Apparently the Senate sponsor considered that revenues derived from the operation of union newspapers, such as advertising revenues, etc., are available for political publicity, although they are union funds in which politically dissentient members have interests proportionally with concurring ones and, it seems, do not give explicit consent to such use. The situation, like the case of the regular incorporated press, would seem to be exceptional in permitting the union (or corporation) to use its own funds for political publicity.

[24] See note 12 *supra*.

The section does not merely deprive the union of the principle of majority rule in political expression.[25] Cf. *DeMille* v. *American Federation of Radio Artists, supra.* It rests upon the presumption that the majority are out of accord with their elected officials in political viewpoint and its expression and, where that presumption is not applicable, it casts the burden of ascertaining minority or individual dissent not upon the dissenters but upon the union and its officials. The former situation may arise, indeed in one notable instance has done so. But that instance hardly can be taken to be a normal or usual case. Unions too most often operate under the electoral process and the principle of majority rule. Nor in the latter situation does it seem reasonable to presume dissent from mere absence of explicit assent, especially in view of long-established union practice.

If merely "minority or dissenter protection" were intended, it would be sufficient for securing this to permit the dissenting members to carry the burden of making known their position and to relieve them of any duty to pay dues or portions of them to be applied to the forbidden uses without jeopardy to their rights as members. This would be clearly sufficient, it would seem, to protect dissenting members against use of funds contributed by them for purposes they disapprove, but would not deprive the union of the right to use the funds of concurring members, more often than otherwise a majority, without securing their express consent in advance of the use.[26]

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[25] It would even seem questionable whether union funds, not individually earmarked for the purpose, could be used for calling union meetings to discuss and determine official political policies or to hear candidates or others expressing their views on campaign issues. Cf. note 30 *infra.*

[26] This difference is minimized, though noted, in the Government's comparison of § 313 with the British legislation and experience. Cf. Trade Union Act of 1913, 2 & 3 Geo. V, c. 30; Trade Disputes and Trade Unions Act of 1927, 17 & 18 Geo. V, c. 22, repealed by

Again, in view of these facts, the section is more broadly drawn than is necessary to reach the intended evil. Moreover, this demonstrates, in my opinion, that "minority protection" was not the only or perhaps the dominant object of its enactment. That object was rather to force unions as such entirely out of political life and activity, including for presently pertinent purposes the expression of organized viewpoint concerning matters affecting their vital interests at the most crucial point where the expression would become effective. Cf. *Thomas* v. *Collins, supra* at 536–537; *Board of Education* v. *Barnette,* 319 U. S. 624, 642; *Bridges* v. *California,* 314 U. S. 252, 269. And so we come back to the conjunction of objectives which, taken together, are claimed to sustain the section's validity.

It would be a very great infringement of individual as well as group freedoms, affecting vast numbers of our citizens, if labor unions could be deprived of all right of expression upon pending political matters affecting their interests. But we need not now decide whether § 313 has gone so far.[27]

For if we assume that the objects said to have been the motivation for enacting § 313 can sustain substantial limitations upon the rights of free expression and assembly,

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Trade Disputes and Trade Unions Act of 1946, 9 & 10 Geo. VI, c. 52. The legislation was not intended to prevent expenditures for union newspapers. See Rothschild, Government Regulation of Trade Unions in Great Britain: II, 38 Col. L. Rev. 1335, 1364. And see further regarding the British legislation's effect, *DeMille* v. *American Federation of Radio Artists,* 31 Cal. 2d 137, 148, distinguishing *Amalgamated Society of Railway Servants* v. *Osborne,* [1910] A. C. 87.

[27] Cf.: "It is perfectly clear that union funds are not to be used to interfere in political campaigns and with political candidates, either in favor of one candidate or against another candidate." 93 Cong. Rec. 6437. "Labor unions are supposed to keep out of politics in the same way that corporations are supposed to keep out of politics." *Id.* 6440.

they cannot support the sweeping and highly indefinite restrictions placed upon them, whether by the section as drawn, as legislatively construed, or as sought to be applied. It is difficult to conceive a statute affecting those rights more lacking in precision, more broad in the scope of doubt and uncertainty of its reach.

We have only the broad and indefinite words "expenditure in connection with any election." Apart from the literal sweep of "expenditure" and the large area of doubt created by efforts to confine it, what is "in connection with"? [28] What is a forbidden because a political comment? [29] What sorts of union activities outside of publishing a newspaper with unsegregated funds would fall under the ban? [30]

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[28] When does the connection begin? Obviously not with the date of the election, primary, convention or caucus. How long beforehand, with the announcement of candidacies or with earlier though not always public efforts to induce persons to run? When does the connection end? With the selection of candidates in the one case and the election of officers in the other or does it extend to activities relating to these events taking place later?

[29] The publication of bare facts, *e. g.*, voting records, of quotations from speeches and addresses, their reproduction in full? Cf. note 13. And does accuracy or inaccuracy of the quotation make the difference between criminality and legality? Could a president's speech in the course of a campaign for reelection be reproduced in a union newspaper published with unsegregated funds, whether designedly and clearly political or purporting not to be so? Where to draw the line between facts and comment, or comment and advocacy or opposition?

[30] A summary from appellees' brief indicates the scope and variety of questions which would arise:

"This measure thus on its face would prevent a labor organization from holding a meeting for the purpose of advocating the election or defeat of a particular political candidate. It would preclude a labor organization from organizing a public gathering to advocate the election of a candidate pledged to the defeat of such a measure as Section 304. [§ 313 as amended.]

"A labor organization under this statute could not place at the

The catalogue of doubt and uncertainty need not be extended. Throughout the preceding discussion, both of coverage and of validity, instances have been noted which demonstrate its encyclopedic scope. The case is not one where a hard core of certain prohibition has been formed, with only a fringe of doubt narrow in scope at its outer boundary. Indeed the difference between the view now

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disposal of a candidate its own hall. It could not engage radio time to denounce a candidate who had identified himself with interests fundamentally opposed to those basic to the interests of the defendants. Nor could it pay the salary or expenses of an individual for the purpose of permitting him to participate in a political campaign.

"Handbills, placards or union newspapers advising the union membership of the voting records of public officials could not be published or distributed at election time to advocate either the election of labor's friends or the defeat of labor's enemies. Paid advertisements and radio publications for the same purposes would be likewise proscribed.

"No matter how dangerous the threat presented by a candidate to the fundamental interests of a labor organization, it is powerless under this law to speak and to inform the people of its views. It could not send to a single member a penny postcard dealing with such a candidate. It could not even send a delegate or observer to a political convention.

"It could oppose bad laws but not 'in connection with any election'. It could endorse good laws but at all times both its opposition and its endorsement would be undertaken at the peril of crossing the line at which such opposition or endorsement or advocacy could be regarded as being 'in connection with any election'.

"Moreover, a labor organization could not sponsor a public meeting in connection with an election for the purpose of hearing the views of candidates of various political parties with respect to issues of importance to its membership since such a meeting would inevitably require expenditures.

"The traditional campaigns on the part of labor organizations prior to federal elections to 'get out the vote' would, since they require expenditures, be proscribed by the statute. And the publication of voting guides and analyses of the voting records of candidates would likewise be condemned."

taken by the Court and that taken by the Senate and presumably by the House shows that even the core is soft. To the gambles of the statute itself are added those of guessing not only at its perimeter but at its very center. Nor have these been lessened by today's decision other than by eliminating the one application the legislative discussion had sought to make clear.

Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long-established constitutional principles surrounding their delimitation. They measure up neither to the requirement of narrow drafting to meet the precise evil sought to be curbed nor to the one that conduct proscribed must be defined with sufficient specificity not to blanket large areas of unforbidden conduct with doubt and uncertainty of coverage. In this respect the Amendment's policy adds its own force to that of due process in the definition of crime to forbid such consequences. Cf. *Winters* v. *New York, supra.* If the statute outlaws all union expenditures for expression of political views, it is a bludgeon ill-designed for curbing the evils said to justify its enactment, without also curbing the rights. If the section does less, the exact thing forbidden is too loosely defined and the consequent cloud cast over the things not proscribed but within the Amendment's bearing is far too great. In this aspect and in view of the criminal sanctions imposed, the section serves as a prior restraint upon the freedoms of expression and of assembly the Amendment was designed to secure. Only a master, if any, could walk the perilous wire strung by the section's criteria.

The force of these considerations is vastly multiplied when it is recalled that, unless they were effective to nullify the section in its application to publicizing activities, the broadly prohibitive and blanketing consequences

would be applicable also to all similar corporate political expressions, possibly not excepting even those of the regularly conducted corporate press.[31] This would be true, for instance, if the Senate sponsor's contrary view should meet the same fate in this Court that his view of the section's application to the presently involved situation has met. Moreover, in the sponsor's view special editions and apparently free distribution by such corporate publishers, containing political items, would appear to fall under the ban.

The argument for applying and sustaining the section in its presently attempted application has gone largely upon the assumption that it would be valid as applied to similar corporate publications, excepting possibly the regular press. The assumption is one not justified by any decision of this Court, which has the final voice in such matters. There are of course important legal and economic differences remaining between corporations and unincorporated associations, including labor unions, which justify large distinctions between them in legal treatment. But to whatever extent this may be true, it does not follow that the broadside and blanketing prohibitions here attempted in restriction of freedom of expression and assembly would be valid in their corporate applications. Cor-

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[31] Cf. the President's view, stated in his veto message as follows:

"Furthermore, this provision can be interpreted as going far beyond its apparent objectives, and as interfering with necessary business activities. It provides no exemption for corporations whose business is the publication of newspapers or the operation of radio stations. It makes no distinctions between expenditures made by such corporations for the purpose of influencing the results of an election, and other expenditures made by them in the normal course of their business 'in connection with' an election. Thus it would raise a host of troublesome questions concerning the legality of many practices ordinarily engaged in by newspapers and radio stations." H. R. Doc. No. 334, 80th Cong., 1st Sess. 9–10.

porations have been held within the First Amendment's protection against restrictions upon the circulation of their media of expression. *Grosjean* v. *American Press Co.*, 297 U. S. 233. It cannot therefore be taken, merely upon legislative assumption, practice or judgment, that restrictions upon freedoms of expression by corporations are valid. Again, those matters cannot be settled finally until this Court has spoken.

Finally, if § 313 is taken in the Court's construction, in my opinion its constitutionality stands in no better case. For I know of nothing in the Amendment's policy or history which turns or permits turning the applicability of its protections upon the difference between regular and merely casual or occasional distributions. Indeed pamphleteering was a common mode of exercising freedom of the press before and at the time of the Amendment's adoption. It cannot have been intended to tolerate exclusion of this form of exercising that freedom. Nor does making the difference between distribution to dues-paying members only and distribution to outsiders or the public, whether with or without price, make a constitutional difference. The Amendment did not make its protections turn on whether the hearer or reader pays, or can pay, for the publication or the privilege of hearing the oral or written pronouncement. Neither freedom of speech and the press nor the right of peaceable assembly is restricted to persons who can and do pay.

A statute which, in the claimed interest of free and honest elections, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election, serving as a prior restraint upon expression not in fact forbidden as well as upon what is, cannot be squared with the First Amendment.

APPENDIX.

"Mr. PEPPER. . . .

"I wish to ask the Senator, if I may, this question: Would the newspaper called Labor, which is published by the Railway Labor Executives, be permitted to put out a special edition of the paper, for example, in support of President Truman, if he should be the Democratic candidate for the Presidency next year, and in opposition to the Senator from Ohio, if he should be the Republican nominee for the Presidency, stating that President Truman was a friend of labor and that the Senator from Ohio was not friendly to labor? Would that be called a political expenditure on the part of the labor organization?

"Mr. TAFT. If it were supported by union funds contributed by union members as union dues it would be a violation of the law, yes. It is exactly as if a railroad itself, using its stockholders' funds, published such an advertisement in the newspaper supporting one candidate as against another. If the paper called Labor is operated independently, if it derives its money from its subscribers, then of course there would be no violation. The prohibition is against a labor organization using its funds either as a contribution to a political campaign or as a direct expenditure of funds on its own behalf." (93 Cong. Rec. 6436.)

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"Mr. PEPPER. . . . Yet the Senator from Ohio says that the newspaper Labor, published by the 21 railway labor executives, would not be permitted to publish a statement saying that it supported President Truman and opposed Candidate Taft, or vice versa. I say that would be a deprivation of the freedom of the press.

"Mr. TAFT. No; I said that union funds could not be used for that purpose. They could conduct a news-

paper if they wanted to, just as a corporation can conduct a newspaper. But why should a labor organization be able to publish pamphlets or special newspapers against one candidate or in favor of another candidate, using funds which that organization collected from the union members?" (*Id.* 6436–6437.)

. . . . .

"Mr. PEPPER. Mr. President, I call the attention of the Senator from Ohio to the following practice of the railway labor executives in the past: If a certain candidate was unfriendly to the interests of labor, they would publish a special edition of their paper and would put that special edition into circulation in the area where that candidate was running for office, and would place it in the hands of labor-union members and also in the hands of the public generally.

"Mr. TAFT. That is exactly what they should not be allowed to do.

"Mr. PEPPER. Very well; I want it definitely understood that the Senator from Ohio intends to outlaw that privilege on the part of labor. Now that I have that clear—

"Mr. TAFT. It is perfectly clear. It is perfectly clear that union funds are not to be used to interfere in political campaigns and with political candidates, either in favor of one candidate or against another candidate. . . ." (*Id.* 6437.)

. . . . .

"Mr. BARKLEY. So if there is a labor organization which is publishing a newspaper—not as a political newspaper, but for the benefit of its members—and if the expenses of that publication and distribution are paid from the funds raised by means of the payment of dues, and if all members of the union understand that a certain portion of their dues goes to the publication of that news-

paper, then in order for that newspaper to take any position with respect to any candidate, it would have to charge a subscription by the month or by the year, in order that it might express its views in that respect; is that so?

"Mr. TAFT. I am inclined to think so, just as a corporation gets out regular house organs to its members, and if that corporation interferes in a political election through one of those house organs it violates the Corrupt Practices Act. . . ." (*Id.* 6437–6438.)

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"Mr. MAGNUSON. In order to determine the meaning of that, let us assume a concrete example. The International Brotherhood of Teamsters have a newspaper, which they have published for many years. It has a circulation of probably 200,000. It is distributed to members. On the newsstand, no price appears on it. No advertisements are accepted. Under this prohibition, would they be prohibited in the future from mentioning in their editorial columns, for their regular circulation, without adding anything additional, the support of a certain candidate or a certain political party?

"Mr. TAFT. We discussed that. We discussed the question of whether or not that newspaper was supported in effect by contributions of corporations or labor organizations, or was paid for by the people who received it. If the latter, I do not think it was an expenditure of union funds or contributions, but if the union simply takes the union funds and publishes a newspaper and uses it as a political organ in an effort to elect or to defeat one man that is prohibited." (*Id.* 6439–6440.)

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"Mr. MAGNUSON. . . . If the pending bill should become law it would mean that all labor organs which are

now in existence would, from now on, be prohibited from participating in a campaign, favoring a candidate, mentioning his name, or endorsing him for public office?

"Mr. TAFT. No; I do not think it means that. The union can issue a newspaper, and can charge the members for the newspaper, that is, the members who buy copies of the newspaper, and the union can put such matters in the newspaper if it wants to. The union can separate the payment of dues from the payment for a newspaper if its members are willing to do so, that is, if the members are willing to subscribe to that kind of a newspaper. I presume the members would be willing to do so. A union can publish such a newspaper, or unions can do as was done last year, organize something like the PAC, a political organization, and receive direct contributions, just so long as members of the union know what they are contributing to, and the dues which they pay into the union treasury are not used for such purpose." (*Id.* 6440.)

LUDECKE *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 723. Argued May 3–4, 1948.—Decided June 21, 1948.

Under authority of the Alien Enemy Act of 1798, which empowers the President, whenever there is a "declared war" between the United States and any foreign country, to provide for the removal of alien enemies from the United States, the President, on July 14, 1945, directed the removal of all alien enemies "deemed by the Attorney General to be dangerous" to the public safety. The Attorney General, on January 18, 1946, ordered removal of petitioner, a German national, from the United States. Challenging the validity of the removal order, petitioner instituted habeas corpus proceedings in the Federal District Court to secure his release from detention under the order. *Held:*

1. The Alien Enemy Act precludes judicial review of the removal order. Pp. 163–166.

2. In the circumstances of relations between the United States and Germany, there exists a "declared war" notwithstanding the cessation of actual hostilities, and the order is enforceable. Pp. 166–170.

3. The Alien Enemy Act, construed as permitting resort to the courts only to challenge its validity and construction, and to raise questions of the existence of a "declared war" and of alien enemy status, does not violate the Bill of Rights of the Federal Constitution. Pp. 170–171.

4. The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of the summary power conferred by the Act does not empower the courts to retry such hearings, nor does it make the withholding of such power from the courts a denial of due process. Pp. 171–172.

163 F. 2d 143, affirmed.

Petitioner, in custody under an order of the Attorney General for his removal from the United States under the Alien Enemy Act, applied to the District Court for a writ of habeas corpus for release from detention under the

order. The District Court's denial of the writ was affirmed by the Circuit Court of Appeals. 163 F. 2d 143. This Court granted certiorari. 333 U. S. 865. *Affirmed,* p. 173.

Petitioner argued the cause and filed a brief *pro se.*

Stanley M. Silverberg argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Melvin Richter.*

George C. Dix filed a brief for unnamed enemy aliens, as *amici curiae,* in support of petitioner.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Fifth Congress committed to the President these powers:

> "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be sub-

> ject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety." (Act of July 6, 1798, 1 Stat. 577, R. S. § 4067, as amended, 40 Stat. 531, 50 U. S. C. § 21.)

This Alien Enemy Act has remained the law of the land, virtually unchanged since 1798.[1] Throughout these one hundred and fifty years executive interpretation and decisions of lower courts have found in the Act an authority for the President which is now questioned, and the further claim is made that, if what the President did comes within the Act, the Congress could not give him such power.[2] Obviously these are issues which properly brought the case here. 333 U. S. 865.

Petitioner, a German alien enemy,[3] was arrested on De-

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[1] There have been a few minor changes in wording. We have duly considered these in light of an argument in the brief of the *amici curiae* and deem them without significance.

[2] We are advised that there are 530 alien enemies, ordered to depart from the United States, whose disposition awaits the outcome of this case.

[3] The district court found that:

"The petitioner was born in Berlin, Germany, on February 5, 1890. He was out of Germany for most of the period of 1923 to March 1933. He returned to Germany in March 1933 and became a member of the Nazi party. Later he had some disagreements with other members and as a result he was sent to a German concentration camp, from which he escaped March 1, 1934, after being confined for over eight months. Sometime thereafter he came to this country and published a book, 'I Knew Hitler' ['*The Story of a Nazi Who Escaped The Blood Purge*'—'In memory of Captain Ernst Roehm and Gregor Strasser and many other Nazis who were betrayed, murdered, and traduced in their graves'], in 1937. His

cember 8, 1941, and, after proceedings before an Alien Enemy Hearing Board on January 16, 1942, was interned by order of the Attorney General, dated February 9, 1942.[4] Under authority of the Act of 1798, the President, on July 14, 1945, directed the removal from the United States of all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States." Proclamation 2655, 10 Fed. Reg. 8947. Accordingly, the Attorney General, on January 18, 1946, ordered petitioner's removal.[5] Denial of a writ of *habeas corpus* for release from detention under this order was affirmed by the court below. 163 F. 2d 143.

As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes "preclude judicial review." Act of June 11, 1946, § 10, 60 Stat. 237, 243. Barring questions of interpretation and constitutionality,

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petition for naturalization as an American citizen was denied December 18, 1939."

The petitioner's attitude was thus expressed in his brief before the district court:

"Fundamentally, it matters not where I live, for I can strive to live the right life and be of service where ever I am. Besides, it may well be a better thing to do the best I can while I can in the midst of a defeated people suffering in body and soul, than to be a futile and frustrated something in the midst of a triumphant people breathing the foul air of self-complacency, hypocrisy, and self-deceit."

[4] No question has been raised as to the validity of these administrative actions taken pursuant to Presidential Proclamation 2526, dated December 7, 1941, 6 Fed. Reg. 6321, 6323, issued under the authority of the Alien Enemy Act.

[5] The order recited that the petitioner was deemed dangerous on the basis of the evidence adduced at hearings before the Alien Enemy Hearing Board on January 16, 1942, and the Repatriation Hearing Board on December 17, 1945. The district court which examined these proceedings found that petitioner had notice and a fair hearing and that the evidence was substantial. See also note 8, *infra*.

the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt. The language employed by the Fifth Congress could hardly be made clearer, or be rendered doubtful, by the incomplete and not always dependable accounts we have of debates in the early years of Congress.[6] That such was the scope of the Act is established by controlling contemporaneous construction. "The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons," Marshall, C. J., in *Brown* v. *United States,* 8 Cranch 110, 126, "appears to me to be as unlimited as the legislature could make it." Washington, J., in *Lockington* v. *Smith,* 15 Fed. Cas. No. 8448 at p. 760. The very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion.[7] This view was expressed by Mr. Justice Iredell shortly after the Act was passed, *Case of Fries,* 9 Fed. Cas. No. 5126, and every judge before whom the question has since come has held that the statute barred judi-

[6] See, however, *United States ex rel. Kessler* v. *Watkins,* 163 F. 2d 140; *Citizens Protective League* v. *Clark,* 81 U. S. App. D. C. 116, 155 F. 2d 290.

[7] "Such a construction would, in my opinion, be at variance with the spirit as well as with the letter of the law, the great object of which was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge. . . . I do not feel myself authorised to impose limits to the authority of the executive magistrate which congress, in the exercise of its constitutional powers, has not seen fit to impose. Nothing in short, can be more clear to my mind, from an attentive consideration of the act in all its parts, than that congress intended to make the judiciary auxiliary to the executive, in effecting the great objects of the law; and that each department was intended to act independently of the other, except that the former was to make the ordinances of the latter, the rule of its decisions." *Lockington* v. *Smith, supra,* at p. 761.

cial review.[8] We would so read the Act if it came before us without the impressive gloss of history.

The power with which Congress vested the President had to be executed by him through others. He provided for the removal of such enemy aliens as were "deemed by the Attorney General" to be dangerous.[9] But such a finding, at the President's behest, was likewise not to be subjected to the scrutiny of courts. For one thing, removal was contingent not upon a finding that in fact an alien was "dangerous." The President was careful to call for the removal of aliens "deemed by the Attorney General to be dangerous." But the short answer is that

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[8] *Citizens Protective League* v. *Clark*, 81 U. S. App. D. C. 116, 155 F. 2d 290; *United States ex rel. Schlueter* v. *Watkins*, 158 F. 2d 853; *United States ex rel. Hack* v. *Clark*, 159 F. 2d 552; *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140; *United States ex rel. Von Ascheberg* v. *Watkins*, 163 F. 2d 1021; *Minotto* v. *Bradley*, 252 F. 600; see *Lockington's Case*, Brightly (Pa.) 269, 280; *Lockington* v. *Smith*, 15 F. Cas. No. 8448, at p. 758; *Ex parte Graber*, 247 F. 882; *De Lacey* v. *United States*, 249 F. 625; *Ex parte Fronklin*, 253 F. 984; *Grahl* v. *United States*, 261 F. 487; cf. *Banning* v. *Penrose*, 255 F. 159; *Ex parte Risse*, 257 F. 102; *Ex parte Gilroy*, 257 F. 110; *United States ex rel. De Cicco* v. *Longo*, 46 F. Supp. 170; *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F. 2d 898; *United States ex rel. D'Esquiva* v. *Uhl*, 137 F. 2d 903; *United States ex rel. Knauer* v. *Jordan*, 158 F. 2d 337. The one exception is the initial view taken by the district court in this case. It rejected the "contention that the only question that the Court may consider in this habeas corpus proceeding is the petitioner's alien enemy status, although there are cases which give suppport to that view," but held the petitioner had had a fair hearing before the Repatriation Board and that there was substantial evidence to support the Attorney General's determination that petitioner was "dangerous." On rehearing, the court noted that the *Schlueter* case, *supra*, foreclosed the issue.

[9] If the President had not added this express qualification, but had conformed his proclamation to the statutory language, presumably the Attorney General would not have acted arbitrarily but would have utilized some such implied standard as "dangerous" in his exercise of the delegated power.

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the Attorney General was the President's voice and conscience. A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits than Congress authorized.

And so we reach the claim that while the President had summary power under the Act, it did not survive cessation of actual hostilities.[10] This claim in effect nullifies the power to deport alien enemies, for such deportations are hardly practicable during the pendency of what is colloquially known as the shooting war.[11] Nor does law

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[10] "The cessation of hostilities does not necessarily end the war power. It was stated in *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161, that the war power includes the power 'to remedy the evils which have arisen from its rise and progress' and continues during that emergency. *Stewart* v. *Kahn*, 11 Wall. 493, 507. Whatever may be the reach of that power, it is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them. No more is involved here." *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116.

[11] The claim is said to be supported by the legislative history of the Act. We do not believe that the paraphrased expressions of a few members of the Fifth Congress could properly sanction at this late date a judicial reading of the statutory phrase "declared war" to mean "state of actual hostilities." See p. 3, *supra*. Nothing needs to be added to the consideration which this point received from the court below in the *Kessler* case. Circuit Judge Augustus Hand, in this case speaking for himself and Circuit Judges L. Hand and Swan, said:

"Appellants' counsel argues that the Congressional debates preceding the enactment of the Alien Law of 1798 by Gallatin, Otis and others, show that Congress intended that 'war' as used in the Alien Enemy Act should be war in fact. We cannot agree that the discussions had such an effect. Gallatin argued that Section 9 of Art. I of the Constitution allowing to the states the free 'Migration or Importation' of aliens until 1808 might stand in the way of the Act as

lag behind common sense. War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops.[12] See *United States* v. *Ander-*

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proposed if it was not limited to a 'state of actual hostilities.' It however was not so limited in the text of the act and it is hard to see how the failure to limit it in words indicated a disposition on the part of Congress to limit it by implication. Otis objected to limiting the exercise of the power to a state of declared war because he thought that the President should have power to deal with enemy aliens in the case of hostilities short of war and in cases where a war was not declared. That Otis wished to add 'hostilities' to the words 'declared war,' and failed in his attempt, does not show that Congress meant that when war was declared active hostilities must exist in order to justify the exercise of the power. The questions raised which were dealt with in the act as finally passed were not how long the power should last when properly invoked, but the conditions upon which it might be invoked. Those conditions were fully met in the present case and no question is raised by appellants' counsel as to the propriety of the President's Proclamation of War. There is no indication in the debates or in the terms of the statute that the exercise of the power, when properly invoked, should cease until peace was made, and peace has not been made in the present case. If the construction of the statute contended for by appellants' counsel were adopted, the Executive would be powerless to carry out internment or deportation which was not exercised during active war and might be obliged to leave the country unprotected from aliens dangerous either because of secrets which they possessed or because of potential inimical activities. It seems quite necessary to suppose that the President could not carry out prior to the official termination of the declared state of war, deportations which the Executive regarded as necessary for the safety of the country but which could not be carried out during active warfare because of the danger to the aliens themselves or the interference with the effective conduct of military operations." (*United States ex rel. Kessler* v. *Watkins,* 163 F. 2d at 142–43.)

[12] It is suggested that a joint letter to the Chairman of a congressional committee by Attorney General Gregory and the Secretary of

son, 9 Wall. 56, 70; *The Protector,* 12 Wall. 700; *McElrath* v. *United States,* 102 U. S. 426, 438; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 167. "The state of war" may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its

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Labor in the Wilson administration reflects a contrary interpretation of this Act. But, as the *Kessler* opinion pointed out: "The letter of Attorney General Gregory referred to by appellants' counsel does not affect our conclusions. When he said that there was no law to exclude aliens he was, in our opinion, plainly referring to conditions after the ratification of the peace treaty, and not to prior conditions." *Ibid.* The text of the letter (dated Feb. 5, 1919) supports that observation: "There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the peace treaty. Unless the bill introduced by you, or one similar in character, is passed it will become necessary on the ratification of peace to set free all of these highly dangerous persons." Hearings before the House Committee on Immigration and Naturalization on H. R. 6750, 66th Cong., 1st Sess., 42–43. And Attorney General Palmer made substantially the same statements to the Senate and House Committees on Immigration. See S. Rep. No. 283, 66th Cong., 1st Sess., 2; H. R. Rep. No. 143, 66th Cong., 1st Sess., 2.

But even if contradictory views were expressed by Attorney General Gregory, they plainly reflect political exigencies which from time to time guide the desire of an administration to secure what in effect is confirming legislation. The confusion of views is strikingly manifested by Attorney General Gregory's recognition that the Act survived the cessation of actual hostilities so as to give authority to apprehend, restrain, and secure enemy aliens. See, generally, World War I cases cited note 8, *supra.* In any event, even if one view expressed by Attorney General Gregory, as against another expressed by him, could be claimed to indicate a deviation from an otherwise uniformly accepted construction of the Act before us, it would hardly touch the true meaning of the statute. As against the conflicting views of one Attorney General we have not only the view but the actions of the present Attorney General and of the President and their ratification by the present Congress. See note 19, *infra.*

termination is a political act.[13] *Ibid.* Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled. Only a few months ago the Court rejected the contention that the state of war in relation to which the President has exercised the authority now challenged was terminated. *Woods* v. *Miller Co.*, 333 U. S. 138. Nothing that has happened since calls for a qualification of that view.[14] It is still true, as was said in the opinion in that case which eyed the war power most jealously, "We have armies abroad exercising our war power and have made no peace terms with our allies, not to mention our principal enemies." *Woods* v. *Miller Co., supra,* at p. 147 (concurring opinion). The situation today is strikingly similar to that of 1919, where this Court observed: "In view of facts of public knowledge, some of which have been referred to, that the treaty of

[13] Of course, there are statutes which have provisions fixing the date of the expiration of the war powers they confer upon the Executive. See, *e. g., Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 167, n. 1 (collection of statutes providing that the authority terminates upon ratification of treaty of peace or by Presidential proclamation). Congress can, of course, provide either by a day certain or a defined event for the expiration of a statute. But when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.

[14] Cf., *e. g.*, the President's address to Congress on March 17, 1948, recommending the enactment of the European recovery program, universal military training, and the temporary reenactment of selective service legislation. H. Doc. No. 569, 80th Cong., 2d Sess. On May 10, 1948, by Executive Order 9957, 13 Fed. Reg. 2503, the President exercised his authority "in time of war, . . . through the Secretary of War, to take possession and assume control of any system or systems of transportation . . . ." (Act of August 29, 1916, 39 Stat. 619, 645, 10 U. S. C. § 1361.)

peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it can not even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid." *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. at 163.

The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that "a state of war still exists." Presidential Proclamation 2714, 12 Fed. Reg. 1; see *Woods* v. *Miller Co., supra,* at p. 140; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116. The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilites do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come.[15] These are matters of political judgment for which judges have neither technical competence nor official responsibility.

This brings us to the final question. Is the statute valid as we have construed it? The same considerations of reason, authority, and history, that led us to reject

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[15] "Rapid changes are taking place in Europe which affect our foreign policy and our national security. . . . Almost 3 years have elapsed since the end of the greatest of all wars, but peace and stability have not returned to the world." H. Doc. No. 569, *supra,* at p. 1.

reading the statutory language "declared war" [16] to mean "actual hostilities," support the validity of the statute. The war power is the war power. If the war, as we have held, has not in fact ended, so as to justify local rent control, *a fortiori,* it validly supports the power given to the President by the Act of 1798 in relation to alien enemies. Nor does it require protracted argument to find no defect in the Act because resort to the courts may be had only to challenge the construction and validity of the statute and to question the existence of the "declared war," as has been done in this case.[17] The Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights.[18] The fact that

[16] We should point out that it is conceded that a "state of war" was "formally declared" against Germany. Act of December 11, 1941, 55 Stat. 796.

[17] The additional question as to whether the person restrained is in fact an alien enemy fourteen years of age or older may also be reviewed by the courts. See cases cited note 8, *supra.* This question is not raised in this case.

[18] The Fifth Congress was also responsible for "An Act concerning Aliens," approved June 25, 1798, 1 Stat. 570, and "An Act in addition to the act, entitled 'An act for the punishment of certain crimes against the United States,'" approved July 14, 1798, 1 Stat. 596, as well as the instant "An Act respecting Alien Enemies," approved July 6, 1798. It is significant that while the former statutes—the Alien and Sedition Acts—were vigorously and contemporaneously attacked as unconstitutional, there was never any issue raised as to the validity of the Alien Enemy Act. James Madison, in his report on the Virginia Resolutions, carefully and caustically differentiated between friendly and enemy alien legislation, as follows: "The next observation to be made is, that much confusion and fallacy have been thrown into the question by blending the two cases of *aliens, members of a hostile nation,* and *aliens, members of friendly nations.* . . . With respect to alien enemies, no doubt has been intimated as to the Federal authority over them; the Constitution having expressly delegated to Congress the power to declare war

hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor bespeak denial of due process to withhold such power from the courts.

Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined. In relation to the distribution of constitutional powers among the three branches of the Government, the optimistic Eighteenth Century language of Mr. Justice Iredell, speaking of this very Act, is still pertinent:

> "All systems of government suppose they are to be administered by men of common sense and common honesty. In our country, as all ultimately depends on the voice of the people, they have it in their power, and it is to be presumed they generally will choose men of this description; but if they will not, the case, to be sure, is without remedy. If they choose fools, they will have foolish laws. If they choose knaves, they will have knavish ones. But this can never be the case until they are generally fools or knaves themselves, which, thank God, is not likely ever to become the character of the American people." (*Case of Fries, supra,* at p. 836.)

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against any nation, and, of course, to treat it and all its members as enemies." 6 Writings of James Madison (Hunt, Editor) 360–61. Similarly, Thomas Jefferson, the author of the Kentucky Resolutions of 1798 and 1799, was careful to point out that the Alien Act under attack was the one "which assumes powers over alien friends." 8 Writings of Thomas Jefferson (Ford, Editor) 466. There was never any questioning of the Alien Enemy Act of 1798 by either Jefferson or Madison nor did either ever suggest its repeal.

Accordingly, we hold that full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it—on the President of the United States. The Founders in their wisdom made him not only the Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs. He who was entrusted with such vast powers in relation to the outside world was also entrusted by Congress, almost throughout the whole life of the nation, with the disposition of alien enemies during a state of war. Such a page of history is worth more than a volume of rhetoric.[19]

Judgment affirmed and stay order entered February 2, 1948, vacated.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join, dissenting.

The petition for habeas corpus in this case alleged that petitioner, a legally admitted resident of the United States,

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[19] It is suggested that Congress ought to do something about correcting today's decision. But the present Congress has apparently anticipated the decision. It has recognized that the President's powers under the Alien Enemy Act of 1798 were not terminated by the cessation of actual hostilities by appropriating funds ". . . for all necessary expenses, incident to the maintenance, care, detention, surveillance, parole, and transportation of alien enemies and their wives and dependent children, including transportation and other expenses in the return of such persons to place of bona fide residence or to such other place as may be authorized by the Attorney General . . . ." 61 Stat. 279, 292. "And the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the action of the Chief Executive. *Brooks* v. *Dewar*, 313 U. S. 354, 361." *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116; see also *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139.

was about to be deported from this country to Germany as a "dangerous" alien enemy, without having been afforded notice and a fair hearing to determine whether he was "dangerous." The Court now holds, as the Government argued, that because of a presidential proclamation, petitioner can be deported by the Attorney General's order without any judicial inquiry whatever into the truth of his allegations.[1] The Court goes further and holds, as I understand its opinion, that the Attorney General can deport him whether he is dangerous or not. The effect of this holding is that any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here, can be summarily seized, interned and deported from the United States by the At-

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[1] The Court specifically holds that this petitioner is not entitled to have this Court or any other court determine whether petitioner has had a fair hearing. The merits of the Attorney General's action are therefore not subject to challenge by the petitioner. Nevertheless the Court in note 3 quotes out of context a short paragraph from a written protest made by petitioner against the Attorney General's procedure. The only possible purpose of this quotation is to indicate that, anyhow, the petitioner ought to be deported because of his views stated in this paragraph of his protest against the Attorney General's procedure. This is a strange kind of due process. The protest pointed out that Hitler had kept petitioner in a concentration camp for eight months for disloyalty to the Nazis and that this Government had then kept him imprisoned for four years on the charge that he was a Nazi. Immediately before the paragraph cited in the Court's opinion, petitioner's protest contained the following statement:

"Far be it from me, however, to thrust my goodwill upon anybody and insist to stay on a community whose public servants of ill will seek to remove me by pitiful procedures and illegal means. Therefore, I propose that I leave voluntarily as a free man, not as a dangerous alien deportee, at the earliest opportunity provided I shall be allowed sixty days to settle my affairs before sailing date."

Is it due judicial process to refuse to review the whole record to determine whether there was a fair hearing and yet attempt to bolster the Attorney General's deportation order by reference to two sentences in a long record?

torney General, and that no court of the United States has any power whatever to review, modify, vacate, reverse, or in any manner affect the Attorney General's deportation order. MR. JUSTICE DOUGLAS has given reasons in his dissenting opinion why he believes that deportation of aliens, without notice and hearing, whether in peace or war, would be a denial of due process of law. I agree with MR. JUSTICE DOUGLAS for many of the reasons he gives that deportation of petitioner without a fair hearing as determined by judicial review is a denial of due process of law.[2] But I do not reach the question of power to deport aliens of countries with which we are at war while we are at war, because I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction. Furthermore, I think there is no act of Congress which lends the slightest basis to the claim that after hostilities with a foreign country have ended the President or the Attorney General, one or both, can deport aliens without a fair hearing reviewable in the courts. On the contrary, when this very question came before Congress after World War I in the interval between the Armistice and the conclusion of formal peace with Germany, Congress unequivocally required that enemy aliens be given a fair hearing before they could be deported.

The Court relies on the Alien Enemy Act of 1798. 1 Stat. 577, 50 U. S. C. § 21–24. That Act did grant extraordinarily broad powers to the President to restrain and "to provide for the removal" of aliens who owe allegiance to a foreign government, but such action is authorized only "whenever there is a declared war between the United States" and such foreign government, or in the event that foreign government attempts or threatens the United States with "any invasion or predatory incursion."

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[2] Compare *Ex parte Endo*, 323 U. S. 283; *Korematsu* v. *United States*, 323 U. S. 214.

The powers given to the President by this statute, I may assume for my purposes, are sufficiently broad to have authorized the President acting through the Attorney General to deport alien Germans from this country while the "declared" second World War was actually going on, or while there was real danger of invasion from Germany. But this 1798 statute, unlike statutes passed in later years, did not expressly prescribe the events which would for statutory purposes mark the termination of the "declared" war or threatened invasions. *See Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 165, n. 1. In such cases we are called on to interpret a statute as best we can so as to carry out the purpose of Congress in connection with the particular right the statute was intended to protect, *United States* v. *Anderson,* 9 Wall. 56, 69–70; *The Protector,* 12 Wall. 700, 702, or the particular evil the statute was intended to guard against. *McElrath* v. *United States,* 102 U. S. 426, 437, 438. See *Judicial Determination of the End of the War,* 47 Col. L. Rev. 255.

The 1798 Act was passed at a time when there was widespread hostility to France on the part of certain groups in the United States. It was asserted by many that France had infiltrated this country with spies preaching "subversive" ideas and activities. Mr. Otis, the chief congressional spokesman for the measure, expressed his fears of ". . . a band of spies . . . spread through the country, from one end of it to the other, who, in case of the introduction of an enemy into our country" might join the enemy "in their attack upon us, and in their plunder of our property . . . ." Annals of Congress, 5th Cong., 2d Sess. 1791. Congressional discussions of this particular measure appear at pp. 1573–1582, 1785–1796, and 2034–2035, Annals of Congress, 5th Cong., 2d Sess.,[3]

[3] In addition to the above discussions of the Alien Enemy Act, frequent references to the Act were made in the congressional debates

and show beyond any reasonable doubt that the Alien Enemy Act of 1798 was intended to grant its extraordinary powers only to prevent alien enemies residing in the United States from extending aid and comfort to an enemy country while dangers from actual fighting hostilities were imminently threatened. Indeed, Mr. Otis, who was most persistent in his expressions of anti-French sentiments and in his aggressive sponsorship of this and its companion Alien and Sedition Acts, is recorded as saying ". . . that in a time of tranquility, he should not desire to put a power like this into the hands of the Executive; but, in a time of war, the citizens of France ought to be considered and treated and watched in a very different manner from citizens of our own country." Annals of Congress, 5th Cong., 2d Sess. 1791. And just before the bill was ordered to be read for its third time, Mr. Gallatin pointed out that the Alien Act had already made it possible for the President to remove all aliens, whether friends or enemies; he interpreted the measure here under consideration, aimed only at alien enemies, as providing "in what manner they may be laid under certain restraints by way of security." For this reason he supported this bill. Annals of Congress, 5th Cong., 2d Sess. 2035.

German aliens could not now, if they would, aid the German Government in war hostilities against the United States. For as declared by the United States Department of State, June 5, 1945, the German armed forces on land and sea had been completely subjugated and had unconditionally surrendered. "There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the admin-

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on the Alien Act, 1 Stat. 570, and the Sedition Act, 1 Stat. 596, both of which were passed within two weeks of the adoption of the Alien Enemy Act. These references appear in many places in the Annals of Congress, 5th Cong., 2d Sess. See *e. g.*, 1973–2028.

istration of the country and compliance with the requirements of the victorious Powers." And the State Department went on to declare that the United States, Russia, Great Britain, and France had assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal, or local government or authority." 12 State Dept. Bull. 1051. And on March 17, 1948, the President of the United States told the Congress that "Almost 3 years have elapsed since the end . . ." of the war with Germany. See Court opinion, n. 15.

Of course it is nothing but a fiction to say that we are now at war with Germany.[4] Whatever else that fiction might support, I refuse to agree that it affords a basis for today's holding that our laws authorize the peacetime banishment of any person on the judicially unreviewable conclusion of a single individual. The 1798 Act did not grant its extraordinary and dangerous powers to be used during the period of fictional wars. As previously pointed out, even Mr. Otis, with all of his fervent support of anti-French legislation, repudiated the suggestion that the Act would vest the President with such dangerous powers in peacetime. Consequently, the Court today gives the 1798 Act a far broader meaning

[4] The Court cites *Woods* v. *Miller Co.*, 333 U. S. 138, as having held that the war with Germany has not yet terminated. I find no such holding in the opinion and no language that even suggests such a holding. We there dealt with the constitutional war powers of Congress, whether all those powers are necessarily non-existent when there are no actual hostilities. Decision of that question has hardly even a remote relevancy to the meaning of the 1798 Alien Enemy Act. The Court today also seeks to support its judgment by a quotation from a concurring opinion in the *Woods* case, *supra*. But the concurring opinion cited was that of a single member of the Court.

than it was given by one of the most vociferous champions of the 1798 series of anti-alien and anti-sedition laws.

Furthermore, the holding today represents an entirely new interpretation of the 1798 Act. For nearly 150 years after the 1798 Act there never came to this Court any case in which the Government asked that the Act be interpreted so as to allow the President or any other person to deport alien enemies without allowing them access to the courts. In fact, less than two months after the end of the actual fighting in the first World War, Attorney General Gregory informed the Congress that, although there was power to continue the internment of alien enemies after the cessation of actual hostilities and until the ratification of a peace treaty, still there was no statute under which they could then be deported.[5] For this reason the Attorney General re-

[5] In a letter addressed to the Chairman of the House Committee on Immigration and Naturalization dated January 9, 1919, Attorney General Gregory explained that a number of German subjects who had "been interned pursuant to section 4067 of the Revised Statutes" [section 1 of the Alien Enemy Act of 1798] were still held in custody. He then stated:

"The authority given by the President to regulate the conduct of enemy aliens during the existence of the war, in my opinion, could not properly be used *at this time* to bring about the deportation of these aliens. There is now, therefore, no law under which these persons can be expelled from the country nor, if once out of it, prevented from returning to this country. I have, therefore, caused to be prepared the inclosed draft of a proposed bill, the provisions of which are self-explanatory." (Italics added.) H. R. Rep. No. 1000, 65th Cong., 3d Sess. 1–2. This position of the Attorney General that there then was no power under existing law to deport enemy aliens was reiterated by representatives of the Attorney General in hearings before the House Committee on Immigration and Naturalization on the bill enacted into law. Hearings on H. R. 6750, 66th Cong., 1st Sess. 3–21. In conformity with this interpretation of the 1798 Alien Enemy Act the Wilson administration did not attempt to deport interned alien

quested Congress to enact new legislation to authorize deportation of enemy aliens at that time. The bill thereafter introduced was endorsed by both the Attorney General and the Secretary of Labor in a joint letter in which they asked that it be given "immediate consideration" in view of the "gravity of this situation." Hearings before the House Committee on Immigration and Naturalization on H. R. 6750, 66th Cong., 1st Sess. 42–43. Several months later Attorney General Palmer submitted substantially the same statements to the House and Senate Committees on Immigration. H. R. Rep. 143, 66th Cong., 1st Sess. 2; S. Rep. 283, 66th Cong., 1st Sess. 2. See also Report of the Attorney General, 1919, 25–28.

A bill to carry out the recommendations of the Wilson administration was later passed, 41 Stat. 593 (1920), but not until it had been amended on the floor of the House of Representatives to require that all alien enemies be given a fair hearing before their deportation. 58 Cong. Rec. 3366. That a fair hearing was the command of Congress is not only shown by the language of the Act but by the text of the congressional hearings, by the committee reports and by congressional debates on the bill. In fact, the House was assured by the ranking member of the Committee reporting the bill that in hearings to deport alien enemies under the bill "a man is entitled to have counsel present, entitled to subpoena witnesses and summon them before him and have a full hearing, at which the stenographer's minutes must be taken." 58 Cong. Rec. 3373. See also 3367 and 3372. Congress therefore after the fighting war was over authorized the deportation of interned alien enemies only if they were

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enemies under the 1798 Act after the Armistice and before Congress by statute expressly authorized such deportations as requested by the two Attorney Generals. Report of the Attorney General 1919, 25–28.

"given full hearing, as in all cases of deportation under existing laws." H. R. Rep. No. 143, 66th Cong., 1st Sess. 2.

This petitioner is in precisely the same status as were the interned alien enemies of the first World War for whom Congress specifically required a fair hearing with court review as a prerequisite to their deportation. Yet the Court today sanctions a procedure whereby petitioner is to be deported without any determination of his charge that he has been denied a fair hearing. The Court can reach such a result only by rejecting the interpretation of the 1798 Act given by two Attorney Generals, upon which Congress acted in 1920. It is held that Congress and the two Attorney Generals of the Wilson administration were wrong in believing that the 1798 Act did not authorize deportation of interned enemy aliens after hostilities and before a peace treaty. And in making its novel interpretation of the 1798 Act the Court today denies this petitioner and others the kind of fair hearing that due process of law was intended to guarantee. See *The Japanese Immigrant Case,* 189 U. S. 86, 100–101, read and explained on the floor of the House of Representatives at 58 Cong. Rec. 3373, read into the House Committee hearings, *supra* at 19–20, and quoted in part in note 2 of MR. JUSTICE DOUGLAS' dissenting opinion.

The Court's opinion seems to fear that Germans if now left in the United States might somehow have a "potency for mischief" even after the complete subjugation and surrender of Germany, at least so long as the "peace of Peace has not come." This "potency for mischief" can of course have no possible relation to apprehension of any invasion by or war with Germany. The apprehension must therefore be based on fear that Germans now residing in the United States might emit ideas dangerous to the "peace of Peace." But the First Amend-

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ment represents this nation's belief that the spread of political ideas must not be suppressed. And the avowed purpose of the Alien Enemy Act was not to stifle the spread of ideas after hostilities had ended.[6] Others in the series of Alien and Sedition Acts did provide for prison punishment of people who had or at least who dared to

[6] As a justification for its interpretation of the 1798 Act the Court appears to adopt the reasons advanced by the Second Circuit Court of Appeals in *United States ex rel. Kessler* v. *Watkins,* 163 F. 2d 140, decided in 1947. That Court emphasized the difficulty of deportation of alien enemies during the time of actual hostility "because of the danger to the aliens themselves or the interference with the effective conduct of military operations." This reasoning would of course be persuasive if the object of the 1798 statute had been punishment of the alien enemies, but the whole legislative history shows that such was not the purpose of the Act. Hence the Act cannot be construed to authorize the deportation of an enemy alien after the war is over as punishment. Furthermore, the purpose of deportation, so far as it was authorized (if authorized) under the 1798 Act, was not to protect the United States from ideas of aliens *after* a war or threatened invasion but to protect the United States against sabotage, etc., *during* a war or threatened invasion. Nevertheless, the Circuit Court of Appeals thought that without its interpretation "the Executive would be powerless to carry out internment or deportation which was not exercised during active war and might be obliged to leave the country unprotected from aliens dangerous either because of secrets which they possessed or because of potential inimical activities." But after a war is over the only "inimical activities" would relate to peacetime governmental matters—not the type of conduct which concerned those who passed the Alien Enemy Act. Moreover, it is difficult to see why it would endanger this country to keep aliens here "because of secrets which they possess." And of course the executive is not powerless to send dangerous aliens out of this country, even if the 1798 Act does not authorize their deportation, for there are other statutes which give broad powers to deport aliens. There is this disadvantage to the Government, however, in connection with the other deportation statutes—they require a hearing and the executive would not have arbitrary power to send them away with or without reasons.

express political ideas.[7] I cannot now agree to an interpretation of the Alien Enemy Act which gives a new life to the long repudiated anti-free speech and anti-free press philosophy of the 1798 Alien and Sedition Acts. I would not disinter that philosophy which the people have long hoped Thomas Jefferson had permanently buried when he pardoned the last person convicted for violation of the Alien and Sedition Acts.

Finally, I wish to call attention to what was said by Circuit Judge Augustus Hand in this case speaking for himself and Circuit Judges Learned Hand and Swan, before whom petitioner argued his own cause. Believing the deportation order before them was not subject to judicial review, they saw no reason for discussing the ". . . nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General . . . ." But they added: "However, on the face of the record it is hard to see why the relator should now be compelled to go back. Of course there may be much not disclosed to justify the step; and it is of doubtful propriety for a court ever to express an opinion on a subject over which it has no power. Therefore, we shall, and should, say no more than to suggest that justice may perhaps be better satisfied if a reconsideration be given him in the light of the changed conditions, since the order of removal was made eighteen months ago." 163 F. 2d at 144.

It is not amiss, I think, to suggest my belief that because of today's opinion individual liberty will be less secure tomorrow than it was yesterday. Certainly the security of aliens is lessened, particularly if their ideas happen to be out of harmony with those of the govern-

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[7] See Bowers, Jefferson and Hamilton, 1925, c. XVI, "Hysterics," and c. XVII, "The Reign of Terror"; 1 Morison, Life of Otis, c. VIII, "A System of Terror."

mental authorities of a period. And there is removed a segment of judicial power to protect individual liberty from arbitrary action, at least until today's judgment is corrected by Congress [8] or by this Court.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur, dissenting.

I do not agree that the sole question open on *habeas corpus* is whether the petitioner is in fact an alien enemy.[1] That delimitation of the historic writ is a wholly arbitrary one. I see no reason for a more narrow range of judicial inquiry here than in *habeas corpus* arising out of any other deportation proceeding.

It is undisputed that in peacetime an alien is protected by the due process clause of the Fifth Amendment. *Wong Wing* v. *United States,* 163 U. S. 228. Federal courts will then determine through *habeas corpus* whether

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[8] It is suggested in the Court's opinion that Congress by appropriating funds in 1947 to "return" alien enemies to their "bona fide residence or to such other place as may be authorized by the Attorney General" has already approved the Attorney General's interpretation of the 1798 Act as authorizing the present deportation of alien enemies without affording them a fair hearing. But no such strained inference can be drawn. Congress did not there or elsewhere express a purpose to deny these aliens a fair hearing after the war was over. Until it does so, I am unwilling to attribute to the Congress any such attempted violation of the constitutional requirement for due process of law.

[1] See *United States ex rel. Schlueter* v. *Watkins,* 67 F. Supp. 556, aff'd 158 F. 2d 853; *United States* v. *Longo,* 46 F. Supp. 170; *United States* v. *Uhl,* 46 F. Supp. 688, rev'd on other grounds, 137 F. 2d 858; *Ex parte Gilroy,* 257 F. 110; *Banning* v. *Penrose,* 255 F. 159; *Ex parte Fronklin,* 253 F. 984; *Minotto* v. *Bradley,* 252 F. 600. Cf. *Citizens Protective League* v. *Clark,* 81 U. S. App. D. C. 116, 155 F. 2d 290; *De Lacey* v. *United States,* 249 F. 625. In the *Schlueter* case it was held that the Constitution and the statute do not require a hearing and thus an alien enemy cannot complain of the character of the hearing he did receive. 67 F. Supp. at 565.

or not a deportation order is based upon procedures affording due process of law. *Vajtauer* v. *Commissioner,* 273 U. S. 103, 106. In deportation proceedings due process requires reasonable notice (*Tisi* v. *Tod,* 264 U. S. 131, 134), a fair hearing (*Bridges* v. *Wixon,* 326 U. S. 135, 156; *Chin Yow* v. *United States,* 208 U. S. 8, 12; *Low Wah Suey* v. *Backus,* 225 U. S. 460), and an order supported by some evidence (*Vajtauer* v. *Commissioner, supra,* p. 106; *Zakonaite* v. *Wolf,* 226 U. S. 272, 274). And see *Kwock Jan Fat* v. *White,* 253 U. S. 454.

The rule of those cases is not restricted to instances where Congress itself has provided for a hearing. *The Japanese Immigrant Case,* 189 U. S. 86, decided in 1903, so held. The Court in that case held that due process required that deportation be had only after notice and hearing even though there, as here, the statute prescribed no such procedure but entrusted the matter wholly to an executive officer.[2] Consistently with that principle we held in *Bridges* v. *Wixon, supra,* that a violation of the rules governing the hearing could be reached on *habeas corpus,* even though the rules were prescribed not by Con-

[2] The Court said, 189 U. S. p. 101: ". . . no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."

gress but by the administrative agency in charge of the deportation proceeding. We stated, p. 154:

> "We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

The same principles are applicable here. The President has classified alien enemies by regulations of general applicability and has authorized deportation only of those deemed dangerous because they have adhered to an enemy government, or the principles thereof. Petitioner was in fact given a hearing in 1945 before the Repatriation Hearing Board in addition to one in 1942 before the Alien Enemy Hearing Board. The order for his deportation recites that "upon consideration of the evidence presented" before those Boards, the Attorney General, in the words of the Proclamation, deems petitioner "to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principle thereof." Those findings and conclusions and the procedure by which they were reached must conform with the requirements of due process. And *habeas corpus* is the time-honored procedure to put them to the test.

The inquiry in this type of case need be no greater an intrusion in the affairs of the Executive branch of government than inquiries by *habeas corpus* in times of peace into a determination that the alien is considered to be an "undesirable resident of the United States." See

Mahler v. *Eby*, 264 U. S. 32. Both involve only a determination that procedural due process is satisfied, that there be a fair hearing, and that the order be based upon some evidence.

The needs of the hour may well require summary apprehension and detention of alien enemies. A nation at war need not be detained by time-consuming procedures while the enemy bores from within. But with an alien enemy behind bars, that danger has passed. If he is to be deported only after a hearing, our constitutional requirements are that the hearing be a fair one. It is foreign to our thought to defend a mock hearing on the ground that in any event it was a mere gratuity. Hearings that are arbitrary and unfair are no hearings at all under our system of government. Against them *habeas corpus* provides in this case the only protection.

The notion that the discretion of any officer of government can override due process is foreign to our system. Due process does not perish when war comes. It is well established that the war power does not remove constitutional limitations safeguarding essential liberties. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426.

AHRENS ET AL. *v.* CLARK, ATTORNEY GENERAL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 446. Argued March 29, 1948.—Decided June 21, 1948.

1. A federal district court is without jurisdiction to issue a writ of habeas corpus if the person detained is not within the territorial jurisdiction of the court when the petition is filed. Pp. 189–193.
2. The history of the statute (28 U. S. C. § 452) conferring power on the district courts, "within their respective jurisdictions," to grant writs of habeas corpus, indicates that conclusion. Pp. 191–193.
3. Considerations of policy which might warrant giving the district courts discretion in this matter are for Congress, not the courts. Pp. 192–193.
4. The jurisdictional requirement that the person for whose relief a petition for a writ of habeas corpus is intended must be within the territorial jurisdiction of the district court is one which Congress has imposed on the power of the district court to act, and it may not be waived by the parties. P. 193.
5. *Ex parte Endo*, 323 U. S. 283, distinguished. P. 193.

Affirmed.

The District Court dismissed petitioners' applications for writs of habeas corpus to secure their release from detention under removal orders issued by the Attorney General under a Presidental Proclamation pursuant to the Alien Enemy Act. The United States Court of Appeals for the District of Columbia dismissed on appeal. This Court granted certiorari. 333 U. S. 826. *Affirmed*, p. 193.

James J. Laughlin argued the cause and filed a brief for petitioners.

Solicitor General Perlman argued the cause for respondent. With him on the brief were *Assistant Attorney General Morison, Stanley M. Silverberg* and *Samuel D. Slade.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE REED.

The initial question presented in this case is the one we reserved in *Ex parte Endo,* 323 U. S. 283, 305, *viz.* whether the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of *habeas corpus.*

Petitioners are some 120 Germans who are being held at Ellis Island, New York, for deportation to Germany. Their deportation has been directed under removal orders issued by the Attorney General who has found that each of them is dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof. These removal orders were issued under Presidential Proclamation 2655 of July 14, 1945 (10 Fed. Reg. 8947) pursuant to the Alien Enemy Act of 1798, R. S. § 4067, 50 U. S. C. § 21. The orders are challenged by these petitions for writs of *habeas corpus* on several grounds, the principal one being that all of them exceed the statutory authority in that they were issued after actual hostilities with Germany ceased.

The petitions were filed in the District Court for the District of Columbia and alleged that petitioners were confined at Ellis Island, New York, and are "subject to the custody and control" of the Attorney General. Respondent moved to dismiss because, *inter alia,* petitioners were outside the territorial confines of the District of Columbia. The Court of Appeals dismissed an appeal from the order of the District Court granting the motion.

The statute, 28 U. S. C. § 452, provides:

> "The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas

> corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

The question at the threshold of the case is whether the words "within their respective jurisdictions" limit the district courts to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdictions of those courts. There are few cases on all fours with the present one, the precise question not having frequently arisen in the lower federal courts. But the general view is that their jurisdiction is so confined. *McGowan* v. *Moody,* 22 App. D. C. 148, 158 *et seq.; In re Bickley,* 3 Fed. Cas. 332. And see *In re Boles,* 48 F. 75; *Ex parte Gouyet,* 175 F. 230, 233; *United States* v. *Day,* 50 F. 2d 816, 817; *Jones* v. *Biddle,* 131 F. 2d 853, 854; *United States* v. *Schlotfeldt,* 136 F. 2d 935, 940.[1] Cf. *Sanders* v. *Allen,* 69 App. D. C. 307, 100 F. 2d 717; *Tippitt* v. *Wood,* 78 U. S. App. D. C. 332, 140 F. 2d 689. That is our view.

We start from the accepted premise that apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial. See *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 467–468, and cases cited. It is not sufficient in our view that the jailer or custodian alone be found in the jurisdiction.

Although the writ is directed to the person in whose custody the party is detained, 28 U. S. C. § 455, the statutory scheme contemplates a procedure which may bring the prisoner before the court. For § 458 provides

[1] But see *Ex parte Fong Yim,* 134 F. 938; *Ex parte Ng Quong Ming,* 135 F. 378.

that "The person making the return shall at the same time bring the body of the party before the judge who granted the writ." See *Walker* v. *Johnston,* 312 U. S. 275. It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose. These are matters of policy which counsel us to construe the jurisdictional provision of the statute in the conventional sense, even though in some situations return of the prisoner to the court where he was tried and convicted might seem to offer some advantages.

The history of the statute supports this view. It came into the law as the Act of February 5, 1867, 14 Stat. 385. And see Act of August 29, 1842, 5 Stat. 539. Prior to that date it was the accepted view that a prisoner must be within the territorial jurisdiction of the District Court in order to obtain from it a writ of *habeas corpus.* See *Ex parte Graham,* 4 Wash. C. C. 211; [2] *In re Bickley,*

[2] The principle which governed the decision was stated by Mr. Justice Washington as follows, 4 Wash. C. C. pp. 211–212:

"It is admitted that these courts, in the exercise of their common law and equity jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed by some law of the United States. The absence of such a power would seem necessarily to result from the organization of the court of the United States, by which two courts are allotted to each of the districts into which the United States are divided, the one denominated a district, and the other a circuit court. This division and appointment of particular courts for each district, necessarily confines the jurisdiction of these local tribunals within the limits of the respective districts within which they are directed to be holden. Were it otherwise, and the court of one district could send compulsory process into any other, so as to draw

3 Fed. Cas. 332. Cf. *United States* v. *Davis*, 5 Cranch C. C. 622. The bill as introduced in the Senate was thought to contain an infirmity. The objection was made on the floor that it would permit "a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further States." Cong. Globe, 39th Cong., 2d Sess. 730. As a result of that objection Senator Trumbull, who had charge of the bill, offered an amendment which added the words "within their respective jurisdictions." *Ibid.* at 790. That amendment was adopted as a satisfactory solution of the imagined difficulty.[3] *Id.* Thus the view that the jurisdiction of the District Court to issue the writ in cases such as this[4] is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court is supported by the language of the statute, by considerations of policy, and by the legislative history of the enactment. We therefore do not feel free to weigh the policy considerations which are advanced for giving dis-

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to itself a jurisdiction over persons and things without the limits of its district, there would result a clashing of jurisdiction between the different courts not easily to be adjusted, and an oppression upon suitors too intolerable to be endured."

[3] The statute then read, "That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; . . ." 14 Stat. 385.

[4] We need not determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights. Cf. *Ex parte Betz; Ex parte Durant; Ex parte Wills; Ex parte Cutino; Ex parte Walczak; Ex parte McKinley;* and *Ex parte Murphy*, all reported together. 329 U. S. 672.

trict courts discretion in cases like this. If that concept is to be imported into this statute, Congress must do so.

Respondent is willing to waive the point, so that we may make a decision on the merits. But the restriction is one which Congress has placed on the power of the District Court to act. Hence it may not be waived by the parties. *United States* v. *Griffin,* 303 U. S. 226, 229.

Ex parte Endo, supra, p. 305, is not opposed to this view. In that case petitioner at the time suit was instituted was within the territorial jurisdiction of the *habeas corpus* court but had subsequently been removed to a different district and circuit. We held, in conformity with the policy underlying Rule 45 (1) of the Court, that jurisdiction of the District Court was not defeated in that manner, no matter how proper the motive behind the removal. We decided that in that situation the court can act as long as it can reach a person who has custody of the petitioner.

Since there is a defect in the jurisdiction of the District Court which remains uncured, we do not reach the question whether the Attorney General is the proper respondent (see §§ 455 and 458; *Wales* v. *Whitney,* 114 U. S. 564, 574; *Jones* v. *Biddle, supra; Sanders* v. *Bennett,* 80 U. S. App. D. C. 32, 148 F. 2d 19) and, if not, whether the objection may be waived, as respondent is willing to do. Cf. *Ex parte Endo, supra,* pp. 305–307.

Affirmed.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY join, dissenting.

The jurisdictional turn this case has taken gives it importance far beyond the serious questions tendered on the merits of petitioners' application. They are alien enemies interned during the war as dangerous to the nation's safety. They now seek to avoid deportation

from a country which takes care for personal liberties, even when its hospitality may be abused, to one which denied its own citizens such rights until its structure of tyranny fell in ruins. Whether or not petitioners have forfeited the right to continued enjoyment of our institutions and the life they foster, and whether the forfeiture has been declared and can now be executed pursuant to lawfully granted authority, are indeed important questions, upon which these petitioners are as much entitled to hearing and decision as Ludecke. Cf. *Ludecke* v. *Watkins, ante,* p. 160, decided today.

But the Court, putting them aside for these petitioners, cuts much more sweepingly at the roots of individual freedom by its decision upon the jurisdictional issue than could any disposition of those issues. The decision attenuates the personal security of every citizen. So does any serious contraction in the availability of the writ of *habeas corpus.* For the first time this Court puts a narrow and rigid territorial limitation upon issuance of the writ by the inferior federal courts. Heretofore such constrictive formulations have been avoided generally, even assiduously, out of regard for the writ's great office in the vindication of personal liberty. See, *e. g., Bowen* v. *Johnston,* 306 U. S. 19, 26–28; *Ex parte Endo,* 323 U. S. 283, 304–307; *Price* v. *Johnston,* 334 U. S. 266; *Wade* v. *Mayo,* 334 U. S. 672.[1]

But today's ruling, departing from that policy, is that the writ can issue only when the place of confinement lies within the limits of the court's territorial jurisdiction. That purely geographic fact and it alone determines the court's competence to act. And this is not merely as a matter of venue or of accommodation in the exercise of authority among tribunals of coordinate power, allowing room for some adaptability to varying circumstances. It is one crucial between competence to act and total impo-

[1] Cf. *Sunal* v. *Large,* 332 U. S. 174, dissenting opinions at 184, 187.

tence. All other considerations are put to one side. Neither the jailer's presence and amenability to process nor his ability or even his willingness to produce the body can cure the court's basic infirmity, if by accident or choice the locus of confinement happens to fall beyond the physical line.

If this is or is to become the law, the full ramifications of the decision are difficult to foresee. It would seem that a great contraction of the writ's classic scope and exposition has taken place,[2] and much of its historic efficacy may have been destroyed. For if absence of the body from the jurisdiction is alone conclusive against existence of power to issue the writ, what of the case where the place of imprisonment, whether by private or public action, is unknown? What also of the situation where that place is located in one district, but the jailer is present in and can be served with process only in another?[3] And if the place of detention lies wholly outside the territorial limits of any federal jurisdiction, although the person or persons exercising restraint are clearly within reach of such authority, is there to be no remedy, even though it is American citizens who are wrongfully deprived of their liberty and Americans answerable to no other power who deprive them of it, whether purporting to act officially or otherwise? In all these cases may the jailers stand in defiance of federal judicial power, and plead either the accident of the locus of detention outside the court's territorial limitations, or their own astuteness in so selecting the place, to nullify judicial competence?

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[2] See text *infra* at note 5.

[3] Congress has not given the District Court power to direct service of the writ to be made outside the limits of the state in which the court sits, see *United States ex rel. Corsetti* v. *Commanding Officer of Camp Upton,* 3 F. R. D. 360, and it is at least questionable whether service on the turnkey would constitute service on the custodian. See *United States ex rel. Goodman* v. *Roberts,* 152 F. 2d 841.

To none of these questions does the Court give answer, although it purports to reserve decision concerning one of them. Yet in all, if power to act rests solely on the body's presence, its absence [4] will render the court impotent even though the jailer is within grasp of its process for compelling production and, it may be, beyond reach of the like process of any other court. For upon the test prescribed, there must be conjunction of the body's presence and the jailer's for the writ to issue. On the other hand, if relief can be given in such cases, where the conjunction does not exist, then it is not true that the federal courts have been stripped of power to afford it only when the body is held within the limits of their territorial jurisdictions, and the Court's grounding of this decision would seem neither necessary nor proper for disposition of the case.

By thus elevating the place of physical custody to the level of exclusive jurisdictional criterion, the Court gives controlling effect to a factor which generally has been regarded as of little or no importance for jurisdictional purposes or for the functioning of the writ in its great office as historically conceived. Perhaps the classic exposition of its nature and availability, as also of the character of the proceeding, is that of Judge Cooley, quoted in part with approval by our opinion in *Ex parte Endo, supra:*

> "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling

[4] Further questions necessarily arise concerning matters of pleading and proof of presence necessary to establish the jurisdiction.

> the oppressor to release his constraint. The whole force of the writ is spent upon the respondent . . . . The place of confinement is therefore not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp. The difficulty of affording redress is not increased by the confinement being beyond the limits of the state, except as greater distance may affect it. The important question is, where is the power of control exercised?" [5]

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[5] *In the Matter of Samuel W. Jackson,* 15 Mich. 417, 439–440. See *Ex parte Endo,* 323 U. S. at 306. At a later point Judge Cooley's opinion continued: "There is no inherent difficulty in the case; and the court of chancery, in the exercise of its power to compel specific performance, frequently exerts an authority over a subject matter in a foreign jurisdiction similar to that which is sought for here. I think the case presented by the petition is one in which we can give relief, and the decision in *United States v. Davis,* 5 *Cranch. C. C.* 622, is in point, and will warrant it. *There are no conflicting decisions. The incidental remarks which have been made in some cases about the remedy applying where the imprisonment is within the state, seem to me of no significance. In none of those cases was attention directed to this particular point . . . .*" (Emphasis added.) P. 441.

Some of the cases following this view are *Emerson* v. *Guthner,* 107 Colo. 83; *Crowell* v. *Crowell,* 190 Ga. 501; *Shaw* v. *Shaw,* 114 S. Car. 300; *Queen* v. *Barnardo,* 24 Q. B. D. 283; *In re Matthews,* 12 Ir. C. L. 233; and see cases cited in *Ex parte Endo,* 323 U. S. at 306. The same position is taken in Church, Habeas Corpus (2d ed.) § 109.

In the *Endo* case, although reserving the precise issue now decided, we said: "There are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ. See [cases cited in note 16 *infra*]. But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. As Judge Cooley stated in *In the Matter of Samuel W. Jackson,* 15 Mich. 417, 439–440:" Then followed the matter quoted in the text ending with the words, "The whole force of the writ is spent upon the respondent;" together with citation of other authorities to similar effect. 323 U. S. 283, 306.

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In this historic view the proceeding in *habeas corpus* is analogous jurisdictionally neither to one *in rem* or *quasi in rem* nor to the anomalously restricted personal action, as developed in the common law, of trespass to realty.[6] Yet the Court's decision gives to this prime remedy for invasion of personal liberty an availability in the inferior federal courts hardly greater than those highly restricted proceedings possess, jurisdictionally speaking, for purposes remedial of injuries to property. Those courts indeed are deprived of powers in *habeas corpus* which, as Judge Cooley pointed out in relation to state tribunals,[7] they may constantly exert with extraterritorial effects in the exercise of their general jurisdiction in equity.

This exaltation of the territorial element in jurisdiction, with such constrictive and potentially destructive consequences, the Court makes by reason of its conception of the meaning of the statutory phrase, "within their respective jurisdictions," 28 U. S. C. § 452; the legislative history of its insertion; and certain considerations of policy, relating especially to the production of persons detained by federal penal or other authorities in courts distant from the places of detention and thought to require the narrow reading given. I do not think these considerations compel so rigid a jurisdictional significance, or that this is necessary to avoid the evils the Court thus seeks to escape.

The jurisdictional problem as presented by the facts involves two questions. The first, the Court does not reach. But it is one I think basic to consideration of the other, a difference no doubt due to different emphasis

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[6] See Restatement, Conflict of Laws, § 624 Special Note (Tent. Draft No. 5, 1929); see also Proposed Final Draft No. 2, Question Suggested for Discussion, § 624; Note, 28 Ky. L. J. 462.

[7] See note 5.

upon the territorial element in jurisdictional matters of this sort. The question is whether the Attorney General is a proper party respondent. The answer turns on whether the petitioners are in his custody [8] and thus are subject to his power of production. In my opinion they are.

The same principle which forbids formulation of rigid jurisdictional limitations upon the use of this prerogative writ in other respects, inconsistent with its availability for performing its office in varying circumstances, forbids limiting those who may be called upon to answer for restraints they unlawfully impose by technical niceties of the law of principal and agent, superior or subordinate in public authority, or immediacy or remoteness of the incidence of the authority or power to restrain. Jurisdictionally speaking, it is, or should be, enough that the respondent named has the power or ability to produce the body when so directed by the court pursuant to process lawfully issued and served upon him.[9]

There can be no question of the Attorney General's power to produce the petitioners in this case. For he is in complete charge of the proceedings leading up to the order directing their removal from the country; [10] indeed

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[8] The statute provides that the "writ shall be directed to the person in whose custody the party is detained." Rev. Stat. § 755, 28 U. S. C. § 455.

[9] See cases cited in notes 5 and 17.

[10] The Executive Proclamation under which the Attorney General was acting provides that all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe." Proclamation 2655, 10 Fed. Reg. 8947. This proclamation was issued pursuant to the authority conferred by the Alien Enemy Act of 1798, 1 Stat. 577.

he claims to have complete discretion to decide whether or not removal shall be directed. In view of his all-pervasive control over their fortunes, it cannot be doubted that he is a proper party to resist "an inquiry into the cause of restraint of liberty" in their cases.[11]

Moreover, there can be no doubt of the Attorney General's amenability, in his official capacity, to process in the District of Columbia searching his official acts for lawful authority,[12] nor does he claim immunity in this respect.

The case therefore is one in which every requisite of jurisdiction, as the writ has been conceived historically, is present. The person having custody of the body has not only the ability but the authority to produce it. He is within reach of the court's process and amenable to it for that purpose. Indeed in this case he is willing to respond and, to that end, to waive any objection he might be entitled to make to the court's exercise of its power.[13] Unless therefore power is totally wanting by reason of petitioners' absence from the district, there is no insuperable obstacle to its exercise in this case. And as to this the Attorney General does not urge, he merely suggests, in view of certain dicta and decisions, see note 18, that the power may be lacking for that reason.

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[11] Furthermore, as the Solicitor General points out in his brief, there is "no reason why the United States cannot waive this particular objection since it has the effect merely of permitting suit against one Government officer rather than another."

[12] See Fed. Rules Civ. Proc., 28 U. S. C. following § 723c, Rule 4 (f).

[13] Upon the facts the situation is one in which the Government quite properly desires a speedy determination upon the merits, in order to avoid the further delay necessarily incident to reaching them by further proceedings. Whether from the viewpoint of establishing the Government's power to remove the petitioners or of terminating the restraint upon their liberties, expedition of the determination is highly desirable.

If so, this can be only because the statutory wording, "within their respective jurisdictions," compels the Court's conclusion.[14] The language, however, does not even purport to define "their respective jurisdictions" in terms of where the body restrained is held. Indeed, it gives no indication that absence of the persons detained from the district which has personal jurisdiction of their custodian creates an insuperable jurisdictional defect, with the necessary consequence that if he is beyond reach of process issued by the courts where the body is held there can be no remedy by *habeas corpus* in any federal court. On the contrary, the wording of the statutory phrase is as consistent with regarding "their respective jurisdictions" as attaching when the court acquires jurisdiction over the jailer by service of process within the limits of its territorial jurisdiction, even though the place of detention is elsewhere, as it is to invert those factors of territorial limitation in the manner of the Court's construction.

It is true that Congress, when it added the phrase, was concerned with the problem, or rather the possibility, that the inferior federal courts might abuse their power,

[14] The 1925 amendment to the statute providing that "the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had" does not limit jurisdiction to grant the writ. See *Ex parte Endo*, 323 U. S. 283, 307, n. 26. The provision is a mere recording requirement applicable in terms only to circuit judges acting individually. Appropriately it does not apply to courts as distinguished from judges because court orders would be recorded by routine procedure, whereas an order issued by a judge in vacation would require special treatment. Since the application in this case was made to a court in session, the requirement does not apply here. But even if it did apply, and even if a recording provision enacted in 1925 could be taken to relate back to the amendment of 1867 to give meaning to the words "within their respective jurisdictions," the wording "the district wherein the restraint complained of is had" could be taken as readily to mean "wherein the power of control is exercised" as "wherein the body is located." Cf. the cases cited in notes 5 and 17.

in issuing the writ, by requiring the production of persons detained in distant places, with the effect of maladjustment in the exercise of authority as among the different federal courts. But it does not follow, as the Court concludes, that it sought to solve those problems in a manner that would deprive all courts of power to issue the writ except those sitting in the place of detention. As will appear, Congress was dealing with an even broader possibility for abuse, and while it sought to limit authority to issue the writ, there is nothing in the statutory language, the legislative history, or the problem of statutory authorization the amendment was introduced to solve, which shows that so narrow and rigid a restriction was contemplated.

To put the matter in proper perspective, before turning to the legislative history and the precise problem with which it was concerned, it is important to emphasize that the alternative to the Court's holding is not that petitioners have a right to be heard in a distant court whenever the Attorney General may there be served. Rather the alternative is that their absence from the district is a circumstance which normally would induce the court to exercise its discretion to decline jurisdiction, but which may be disregarded in exceptional circumstances if the respondent so desires or if the court finds that justice in the particular circumstances so demands.

Even though we start from the accepted premise that for this purpose the jurisdiction of the district court is territorial, see *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 467–468, we should also recall, as has already been stated, that the Attorney General is within the territorial jurisdiction of the court in which these proceedings were instituted. It is within his power to terminate the restraint of petitioners' liberty without leaving the District of Columbia. In the sense stated by Judge Cooley, his

power of control is exercised within that District. We have no problem of issuing process to be served outside the District of Columbia such as might result in "a clashing of jurisdiction between the different courts not easily to be adjusted, and an oppression upon suitors too intolerable to be endured," and with which alone in my opinion the statutory phrase sought to deal.[15]

When the cases where both the custodian and his prisoner are outside the territorial jurisdiction of the court [16] are separated from those where the custodian is within the jurisdiction though the prisoner is elsewhere,[17] the weight of authority in the lower federal courts is opposed to the conclusion reached today.[18] With the former class

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[15] See *Ex parte Graham,* 4 Wash. C. C. 211, 212. See note 2 of the Court's opinion. In that case, as in most of the cases cited by the Court, the custodian and the prisoner were both outside the territorial jurisdiction of the court. See notes 16, 17 and 18.

[16] *Ex parte Graham,* 4 Wash. C. C. 211; *In re Boles,* 48 F. 75; *Ex parte Gouyet,* 175 F. 230; *Ex parte Yee Hick Ho,* 33 F. 2d 360; *United States* v. *Day,* 50 F. 2d 816 (in this case the custodian did appear in court, but only specially to challenge its jurisdiction); *Jones* v. *Biddle,* 131 F. 2d 853; *United States* v. *Schlotfeldt,* 136 F. 2d 935.

[17] *United States* v. *Davis,* 5 Cranch C. C. 622; *In re Bickley,* 3 Fed. Cas. 332, No. 1,387; *McGowan* v. *Moody,* 22 App. D. C. 148; *Ex parte Fong Yim,* 134 F. 938; *Ex parte Ng Quong Ming,* 135 F. 378; *Sanders* v. *Allen,* 69 App. D. C. 307, 100 F. 2d 717. See *Tippitt* v. *Wood,* 140 F. 2d 689; *Burns* v. *Welch,* 159 F. 2d 29.

[18] Of the cases cited in note 17 only *McGowan* v. *Moody* and *In re Bickley* are in accord with today's decision. And even those two cases are distinguishable. In *McGowan* v. *Moody* the principal ground of decision seems to have been that the prisoner was not in the actual custody of the Secretary of the Navy. See 22 App. D. C. at 163–164. Moreover, the authority of that case is questionable in view of later decisions by the same court, see note 24 *infra.* Although *In re Bickley* does rest on the ground that the court was not "competent to give the relief asked for" and uses the term "jurisdiction," it is well known that at that time the term "jurisdiction" was often

this case is not concerned. But, for reasons yet to be stated, it is with that class alone, in my opinion, that the phrase "within their respective jurisdictions" sought to deal. Moreover, other authorities have generally taken the position that jurisdiction over the custodian is sufficient regardless of the location of the party restrained.[19] In the light of this prevailing conception of the problem, we turn to the Court's reasons for departing from it.

Principal reliance is placed on the legislative history of the 1867 amendment. But this history neither requires nor, in my opinion, justifies the Court's view. It consists in a short statement by Senator Johnson, followed by brief colloquy, which led to insertion of the phrase. Cong. Globe, 39th Cong., 2d Sess. 730, 790, 899. It seems quite clear that he was concerned about a wholly different problem, arising from the bill's broad wording before the limiting phrase was introduced.[20] This was the possibility that the bill would confer power upon district judges to issue process against jailers in remote districts, and thus create departure from the usual rule, in *habeas corpus* cases as in others, that process does not run beyond the territorial jurisdiction of the issuing court. The Senator

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used in the sense of "venue," and since the custodian did not waive the defect it was not necessary for the court to reach the precise issue adjudicated today. In fact the opinion intimates that the result would have been different if the point had been "freely conceded." See pp. 333–334.

[19] See note 5.

[20] The bill, prior to addition of the phrase, read pertinently as follows: "*Be it enacted, &c.*, That the several courts of the United States and the several justices and judges of such courts, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States . . . ." Cong. Globe, 39th Cong., 2d Sess. 730.

wished to make sure that the bill would not have that effect. And the underlying assumption of the entire discussion was that, without the limitation proposed, the bill's unlimited language might be taken to give authority to district courts to issue process to run throughout the country, comparable as was said to that exercised by justices of this Court, or even beyond its borders,[21] and thus to bring before them jailers without regard to distance.

It was this possibility which led to the proposal and acceptance of the amendment, not that a jailer within the court's jurisdiction, *i. e.*, in reach of its process issued and served within its territorial jurisdiction, might detain the body outside those limits and be required to bring it before the court when ordered. Indeed there is not a word in the legislative discussion about the latter situation, or to suggest that it was the cause either of concern or of the amendment's inclusion. Neither Senator Johnson nor anyone else seems to have had in mind the situation where the locus of detention is in one jurisdiction and the jailer is present in another, amenable to its process.[22] It is this crucial fact which the Court's opinion and ruling ignore.

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[21] When the amendment "within their respective jurisdictions" was suggested, Senator Johnson commented on it as follows: "The amendment proposed by the honorable chairman is entirely satisfactory to me. I suggested the necessity of an amendment the other day because I know that the late Chief Justice of the United States decided that under the laws as they stand process issued by a judge of the Supreme Court in cases where those judges have a right to issue process extends all over the Union. That I am satisfied might lead to a practical evil. The amendment proposed by the honorable chairman is entirely satisfactory to me and removes that difficulty." Cong. Globe, 39th Cong., 2d Sess. 790.

[22] The discussion of the amendment in the Senate was limited to the statements by Senator Johnson, quoted in part in note 21, and the remarks of Senator Trumbull, who introduced the amendment as a result of Senator Johnson's statement. See Cong. Globe, 39th Cong., 2d Sess. 730, 790.

Confining the running of the court's process to its territorial jurisdiction is of course a very different thing from confining its jurisdiction to cases in which the prisoner's body is located within those limits. Most importantly, it is one much less destructive of the writ's efficacy in cases where it may be most needed, and of the historic conception of the nature and scope of the proceeding. The amendment's terms are completely satisfied, are given their full and intended effect, if they are limited to the former object. So taken, they do no more than prevent the section's otherwise unlimited phrasing from authorizing process to run without territorial limitation, cf. *Georgia* v. *Pennsylvania R. Co., supra* at 467–468, and authorities cited; they do not trench upon the writ's classic availability or its utility as a prime safeguard of freedom. There is no hint in either the amendment's wording or in its legislative history that it had any such restrictive purpose or effect. The entire measure was adopted in fact, not to reduce, but to expand the writ's availability.[23]

In view of this history and its effect for the statute's meaning and purpose, the considerations of policy and convenience upon which the Court relies to bolster its view can have no proper influence to give that view validity. Indeed, if the legislative history were less clear than it is against the Court's conception, a due and hitherto traditional regard for the writ's high office should dictate resolving any doubt, as between the possible constructions, against a jurisdictional limitation so destruc-

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[23] The Act of 1867 was an important liberalizing measure in two respects. Substantively, the statute authorized the issuance of the writ to relieve any detention in violation of the Constitution or laws of the United States. Procedurally, the remedy was extended to all persons in state as well as in federal custody. See Note, 61 Harv. L. Rev. 657, 659. "[N]o indication has been found of intent to narrow the act . . . ." *Ibid.*, n. 22.

tive of the writ's availability and adaptability to all the varying conditions and devices by which liberty may be unlawfully restrained.

Especially is this true since no such rigid restriction is necessary to provide adequate safeguard against the evils the Court envisages. It seems to proceed upon the assumption that if jurisdiction in the District of Columbia were admitted, federal prisoners thousands of miles away would have an unqualified right to invoke it.

On the contrary, if the Attorney General should not waive objection to proceeding in the District of Columbia as he has done here and there were no compelling reason for overriding his objection, such as the absence of any possible remedy elsewhere, the courts of the District clearly would have discretion to decline the exercise of their jurisdiction. Indeed, in the vast majority of such cases, where remedy would be available in a more convenient forum, it would be their duty to do so and an abuse of discretion, subject to correction upon review, for them to compel the petitioner's production in such an inconvenient or otherwise inappropriate forum. See *Beard* v. *Bennett,* 114 F. 2d 578, 580–581.

In this view it would be only the exceptional case of detention outside the District and pursuant to authority independent of its affairs, which would require or indeed permit the exercise of jurisdiction by its courts. On the other hand, in the situations where the District has a peculiar interest that its courts shall have power in such cases, namely, those affecting its penal institutions located outside its borders, they would not be deprived of jurisdiction, as the present decision consistently applied would seem to necessitate.[24]

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[24] The District of Columbia Reformatory is located at Lorton, Virginia, and the District Workhouse is at Occoquan, Virginia. Persons are confined in these institutions for violations of the District of Columbia Code. The official in charge of both institutions is

The Court has reserved decision upon cases where the place of confinement is not within the territorial jurisdiction of any court.[25] And it has sought to distinguish *Ex parte Endo, supra.* I agree that the reservation and the distinction should be made. But I think the fact they have been found necessary goes far to destroy the validity of the present decision's grounding.

Cases of the type reserved have arisen recently on application for original writs of *habeas corpus* by petitioners detained by the military authorities in Germany and Japan. *Ex parte Betz; Ex parte Durant; Ex parte*

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a resident of the District and maintains his headquarters in the District. For obvious administrative reasons, the Court of Appeals of the District of Columbia has therefore held that applications for *habeas corpus* may be filed in courts of the District by inmates of those institutions even though they are confined beyond its territorial jurisdiction. *Sanders* v. *Allen,* 69 App. D. C. 307, 100 F. 2d 717. See *Burns* v. *Welch,* 159 F. 2d 29. Under today's ruling such petitions must hereafter be filed in the Virginia federal court to the inconvenience of the parties and of the court, which must to a certain extent apply law peculiar to the District of Columbia.

It is of interest that the Court of Appeals reached this result in the face of the apparently inconsistent earlier holding in *McGowan* v. *Moody,* 22 App. D. C. 148. That case has been explained either on the ground that even though the court had jurisdiction it properly declined to exercise it because relief was available elsewhere, see *Sanders* v. *Allen,* 69 App. D. C. 307, 309, 100 F. 2d 717, 719, but cf. note 25 *infra,* or, at least by implication, on the ground that Secretary Moody was not a proper party respondent. See *Sanders* v. *Bennett,* 80 U. S. App. D. C. 32, 33, 148 F. 2d 19, 20, n. 2. Both of these grounds indicate that the Court of Appeals no longer regards *McGowan* v. *Moody* as authority for the proposition for which the Court cites it today.

[25] The logical inconsistency of this reservation with the decision is highlighted by the citation, apparently with approval, of *McGowan* v. *Moody,* 22 App. D. C. 148, where the court expressly assumed that if it had no jurisdiction, there would be no tribunal in which relief might be had. P. 158. In that case the petitioner sought relief against the Secretary of the Navy in behalf of a Marine imprisoned on Guam.

Wills; Ex parte Cutino; Ex parte Walczak; Ex parte McKinley; Ex parte Murphy, 329 U. S. 672. Some of those petitioners were citizens of the United States; some were civilians, others members of the armed forces. In some instances the detention was pursuant to sentences imposed by military tribunals for alleged offenses, death being the penalty in one. In other cases the petitioners claimed to be confined for indefinite periods without charge and without trial.

The jurisdictional questions raised by those petitions are of profound importance.[26] And if any of the reasons advanced for today's decision is deemed controlling, all such questions will be resolved in the future against such petitioners. Perhaps when those cases arise the Court will ignore the reasons relied on today, just as today it ignores the reasoning relied on in *Ex parte Endo.* For if absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, what lawyers call jurisdiction in the fundamental sense, then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had and whether a rule of this Court, Rule 45 (1), can override a basic jurisdictional limitation Congress has imposed.

In any event, I cannot subscribe to the view that Congress has laid down a jurisdictional criterion so capricious in its consequences or so destructive of the writ's historic nature, scope and availability. As was stated at the beginning, the full ramifications of the decision are difficult to foresee. It is one thing to lay down a rule of discretion adequate to prevent flooding the courts of the

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[26] See Wolfson, Americans Abroad and Habeas Corpus, 9 F. Bar J. 142.

District of Columbia with applications for *habeas corpus* from the country at large. It is entirely another to tie their hands, and those of all other inferior federal courts, with a strict jurisdictional limitation which can only defeat the writ's efficacy in many cases where it may be most needed.

Not the least important of these may be instances arising in the future where persons are wrongfully detained in places unknown to those who would apply for *habeas corpus* in their behalf. Without knowing the district of confinement, a petitioner would be unable to sustain the burden of establishing jurisdiction in any court in the land. Such a situation might arise from military detention, cf. *Duncan* v. *Kohanamoku,* 327 U. S. 304; *Ex parte Milligan,* 4 Wall. 2; *In the Matter of Samuel Stacy,* 10 Johns. 328; or as a result of mass evacuation of groups from a given area in time of emergency with consequent disruption of the means of keeping personnel records in order, cf. *Hirabayashi* v. *United States,* 320 U. S. 81; *Ex parte Endo, supra;* or possibly, though it is to be hoped not often, even from wilful misconduct by arbitrary executive officials overreaching their constitutional or statutory authority. These dangers may seem unreal in the United States. But the experience of less fortunate countries should serve as a warning against the unwarranted curtailment of the jurisdiction of our courts to protect the liberty of the individual by means of the writ of *habeas corpus.*

Accordingly, I dissent from the conclusion and judgment of the Court. Since I think the District Court had jurisdiction and since also the Attorney General has waived any objection to its exercise in this case, for reasons certainly not inadequate, I am also of the view that the case should be decided on the merits.

COMSTOCK *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.

NO. 451. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Argued March 9–10, 1948.—Decided June 21, 1948.

After certain railroads had been in reorganization under § 77 of the Bankruptcy Act for more than ten years and a second plan of reorganization had been approved by the Interstate Commerce Commission and was before a Federal District Court for approval, petitioner, who had recently bought securities of one of the subsidiary railroads at ten cents on the dollar, objected to allowance of a previously unchallenged large claim of the parent railroad against that subsidiary. He contended that the parent had dominated and controlled the subsidiary and had mismanaged its affairs to the detriment of the subsidiary and its other creditors and that it would be inequitable to allow the claim. After full hearing, the District Court found that the parent had dominated and controlled the subsidiary but that its administration of the subsidiary's affairs had been in good faith and to the advantage of the subsidiary and its other creditors, that the claim was valid and should be allowed, and that the reorganization plan was fair and equitable and in accordance with law. It accordingly overruled petitioner's objections. The Circuit Court of Appeals concurred fully in the District Court's findings of fact and affirmed its ruling. *Held:*

1. In the absence of a very exceptional showing of error, the concurrent findings of fact of the two courts below are final in this Court. Pp. 213–214.

2. In view of the amount and position of the claim involved and the fact that the subject matter of the objections was such that it went beyond petitioner's individual interests and affected the fairness and equity of the plan, the District Court did not err in adjudging the objections on their merits—even though petitioner

*Together with No. 452, *New Orleans, Texas & Mexico Railway Co.* v. *Group of Institutional Investors et al.;* No. 453, *Thompson, Trustee,* v. *Group of Institutional Investors et al.;* and No. 454, *Comstock* v. *Thompson, Trustee, et al.,* also on certiorari to the same court.

may have been barred by laches and other equitable considerations from asserting a cause of action in his own behalf. Pp. 226–227.

3. In view of the functions cast upon the bankruptcy court in such cases, it may, in its discretion, consider objections on their merits, even though they have not been presented to the Commission. P. 227.

4. The court should be diligent to protect itself and the public from approval of unfair plans, even by default, and may take for its own use evidence no party would have a right to force upon it. Pp. 227–228.

5. Even though the parent had dominated and controlled the subsidiary, the District Court's allowance of the claim was not an error of law—in view of its finding that the parent's administration of the subsidiary's affairs was in good faith and was beneficial and advantageous to the subsidiary and its other creditors. *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, distinguished. Pp. 228–231.

6. The claim was not invalidated or barred by the fact that, under control of the parent, dividends were paid by the subsidiary at a time when it was borrowing money represented by the claim—in view of the finding below that the dividends were paid out of current earnings or surplus, and not in bad faith or in violation of law or contract. Pp. 229–230.

163 F. 2d 350, affirmed; *id.* 358, certiorari dismissed.

In a railroad reorganization proceeding under § 77 of the Bankruptcy Act, the District Court overruled certain objections to a plan of reorganization. 64 F. Supp. 64. In No. 451 the Circuit Court of Appeals affirmed. 163 F. 2d 350. In Nos. 452, 453, 454 the appeals were dismissed. 163 F. 2d 358. This Court granted certiorari. 332 U. S. 850. No. 451 *affirmed;* Nos. 452, 453, 454 certiorari dismissed, p. 231.

Maxwell Brandwen argued the cause, and *William H. Biggs* filed a brief, for petitioners.

Charles W. McConaughy argued the cause for the Group of Institutional Investors et al.; and *Leonard P. Moore* argued the cause for the Manufacturers Trust Co.,

respondents. With them on the brief were *Clair B. Hughes* and *Sanford H. E. Freund.*

Harry Kirshbaum argued the cause and filed a brief for the Convertible Bondholders Group, respondents.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Since 1933 the Missouri Pacific, the New Orleans, Texas and Mexico Railway Co. and a number of affiliated railroad corporations have been in reorganization under the Bankruptcy Act, 11 U. S. C. § 205. A second plan of reorganization, approved by the Interstate Commerce Commission, was before the District Court for the Eastern District of Missouri. Comstock then, in 1944, made objection to allowance of a claim of approximately 10 million dollars by the Missouri Pacific, one debtor corporation, against another, the New Orleans, which, during the 10 years of proceedings, had been unchallenged. The issues raised by his objection were severed from other problems of reorganization which do not concern us here. After full hearing the District Court made findings and wrote an opinion, *In re Missouri Pacific R. Co.*, 64 F. Supp. 64, overruling his objections. The Circuit Court of Appeals for the Eighth Circuit affirmed. *Comstock* v. *Group of Institutional Investors,* 163 F. 2d 350.

The issues of fact, contested in a long hearing, are not before us for review. Petitioner assured us, in support of the petition for certiorari here, that "there is no factual controversy before this Court" and "we assume the findings of the District Court. Our challenge is directed only to the legal import of these unchallenged facts."

Much of petitioner's argument seems to depart from these assumptions and to invite us to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below. This we cannot do.

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A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. *Stuart* v. *Hayden,* 169 U. S. 1; *Brainard* v. *Buck,* 184 U. S. 99; *First National Bank* v. *Littlefield,* 226 U. S. 110; *Baker* v. *Schofield,* 243 U. S. 114; *Second Russian Insurance Co.* v. *Miller,* 268 U. S. 552; *Texas & N. O. R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *Page* v. *Arkansas Natural Gas Corp.,* 286 U. S. 269; *Pick Mfg. Co.* v. *General Motors Corp.,* 299 U. S. 3; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515; *United States* v. *O'Donnell,* 303 U. S. 501; *Anderson* v. *Abbott,* 321 U. S. 349; *Allen* v. *Trust Co.,* 326 U. S. 630; *United States* v. *Dickinson,* 331 U. S. 745. No such error is claimed by petitioner.

Since we are concluded by such concurrent findings, we can do no better than to adopt the statement of facts made in the opinion of the Court of Appeals, on the basis of which petitioner's propositions of law are predicated and must be decided. The essential facts so recited are:

> "It appears that the Missouri Pacific acquired the controlling interest in the capital stock of the New Orleans at the end of 1924 and at times relevant here owned from 58 to 93 percent of the total $15,000,000 par value of such stock, and from January 1925, until simultaneous commencement of reorganization proceedings in bankruptcy of both corporations in 1933, it managed the affairs of the New Orleans through Missouri Pacific officers who were given corresponding positions in the New Orleans corporation. An expansion program for both companies was carried on and throughout the course of operations the Missouri Pacific made advancements for improvements and betterments to the New Orleans. Some were repaid, but in February 1933, the

New Orleans filed its application with the Interstate Commerce Commission under Section 20a of the Transportation Act (49 U.S.C.A. Sec. 20a (2)), showing that it was indebted to the Missouri Pacific for an accumulation of such advances over a period of years remaining unpaid in the sum of $10,355,226.78, and that it had been requested by the Missouri Pacific to issue demand notes therefor in the amount of $9,955,226.78 to the Missouri Pacific. It had partially complied by issuing one such note for $400,000.00, and one for $2,498,500, and after hearing the Commission made its finding as required by the statute,[1] 49 U.S.C.A. Sec. 20a (2), and authorized New Orleans to issue to the Missouri Pacific a note for the remaining $7,456,726.78. So that at the time of the bankruptcy of the New Orleans on the same date as that of the Missouri Pacific the notes of the New Orleans to the Missouri Pacific in the sum of $10,355,226.78 were outstanding and unpaid. Under authorization of the Interstate Commerce Commission, granted after hearing, the Missouri Pacific had pledged two of the notes aggregating $9,955,226.78 as security for loans made to it by the Reconstruction Finance Corporation. An additional pledge was made to Railroad Finance Corporation.

"After appointment of the trustees for the railroads

"1 '* * * that the issue by the New Orleans, Texas & Mexico Railway Company of a note or notes in an aggregate amount not exceeding $7,456,726.78, as aforesaid, (2) is for a lawful object within its corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.' New Orleans, Texas & Mexico Railway Company Notes, Finance Docket No. 9817; 189 ICC 600, 601, (1933) (R. 20839–20840)."

and on August 29, 1938, an officer of the Missouri Pacific filed claim for that company against the New Orleans for the amount of the notes, plus an item of advancement of $210,000.00, aggregating the amount of $10,565,226.78, describing the consideration as 'cash advances for operation, interest payments, etc., at various times from March 1929 to February 1933, both inclusive.' The items which made up the total $10,565,226.78 were clearly specified and evidence of the validity of the debt as consideration for the notes was adduced before the Commission at an early stage of these Section 77 proceedings, and the obligation was deemed to be valid and ahead of New Orleans' stockholder interest in all of the accountings, computations and adjustments resulting in the plan of reorganization determined by the Commission and approved by the court in 1940. It has also been so considered by the Commission in the plan of reorganization before the court at the time of the hearing and order now appealed from.

"It appears that in 1926 the Missouri Pacific issued and caused to be sold to the public its 5¼% Secured Serial Bonds in the amount of $13,156,000, secured by the pledge of $1000.00 par value of New Orleans capital stock for each $1000.00 principal amount of outstanding bonds, so that the officers who were put in charge of the affairs of both corporations came under fiduciary obligation to the creditors and the stockholders of each company to handle honestly the affairs of each.

"Comstock owns some of said 5¼% Secured Serial Bonds so secured by the pledge of the New Orleans capital stock, and by virtue of his ownership of said bonds he has an interest as a creditor of the Missouri Pacific in the payment of his bonds and the interest

thereon, and also an interest in the capital stock of the New Orleans pledged to secure the bonds. On November 22, 1944, he filed his objections to the plan of reorganization and plea for equitable treatment on the basis of those interests. Certain of his objections contained charges of mismanagement of the Missouri Pacific to his detriment as a bondholding creditor of that corporation, but the separately numbered objections here involved relate to wrongs which he alleges were done by the Missouri Pacific to the New Orleans to the detriment of his interest in the pledged stock of that company.

"By his objections 'Numbered 19 and related objections,' Comstock charged that during the period when the affairs of the New Orleans were controlled by its majority stockholder the Missouri Pacific, between the end of 1924 and the bankruptcy in 1933, the Missouri Pacific management caused the New Orleans to pay dividends illegally out of capital and to improvidently declare and pay dividends unjustified by the business and condition of the New Orleans; improperly loaned money to it for the purpose of enabling it to pay dividends; involved it (the New Orleans) in expansion and improperly made advancements to it and caused it to assume indebtedness growing out of expansion; caused it to be operated with unfair advantage to the Missouri Pacific and loss to itself, and generally mismanaged it and committed spoliation and waste of its property and interests to the financial detriment of the New Orleans and for the benefit of the Missouri Pacific. There is also a charge that the trustee for the New Orleans, who is also trustee for the Missouri Pacific, failed to perform his duties as trustee for the New Orleans, to the detriment of New Orleans stock

interest. Although an Exhibit 'A' attached to the objections assumed to set forth details, the charges remained sweeping and general in form with few exceptions.[2]

"The objector prayed that the Missouri Pacific claim for $10,565,227 and interest against the New Orleans be disallowed; that it be determined that the New Orleans was not indebted to the Missouri Pacific, and in the alternative, that all claims of the Missouri Pacific against the New Orleans be subordinated in the reorganization to the New Orleans capital stock interest.

"The allegations of breaches of obligations on the part of the Missouri Pacific were traversed in pleadings of other parties in interest. The main burden of producing witnesses and evidence to justify the handling of the affairs of the New Orleans by the Missouri Pacific during the period of Missouri Pacific management and to prove the $10,565,226.78 indebtedness of the New Orleans to the Missouri Pacific was carried at the trial by the Group of Institutional Investors Holding First and Refunding Mortgage Bonds of Missouri Pacific Railroad Company and The Protective Committee for the holders of General Mortgage Bonds of Missouri Pacific Railroad Company. They recognized fully the fiduciary nature of the obligation which law and equity attributed to the Missouri Pacific by reason of its pledge of the capital stock of the New Orleans to secure the 5¼% Serial Bonds while the New Orleans was under its management as majority stockholder, and that by the terms

"[2] The Exhibit 'A' also included excerpts from a report of a subcommittee of the United States Senate on the subject of Missouri Pacific System—Inter Company Dividends and Advances, published about July 29, 1940, which criticized Missouri Pacific management of the New Orleans."

of the pledge the Missouri Pacific was entitled to receive itself only the dividends (lawfully and properly declared) of the New Orleans stock and was required as to the corpus of said stock to honestly manage the corporate affairs and to exercise honest judgment and good faith to preserve the stock interest inviolate.

"Comstock did not question or deny that the New Orleans had executed its negotiable promissory notes to the Missouri Pacific which were outstanding at the time of the trial drawing interest, and conceded that the Reconstruction Finance Corporation as an innocent holder thereof in pledge could hold the New Orleans for their face amount and interest, but his contention was that by reason of its wrong-doings the Missouri Pacific either had no valid claim or that such claim as it had should be subordinated to the capital stock interest. He did not assert or tender evidence to show that any specified individuals working for the New Orleans or the Missouri Pacific, or both companies, had misappropriated or wrongfully diverted to their own use any of the assets or business of the New Orleans to the detriment of stockholders. He tendered no evidence to show that the plan of Missouri Pacific system expansion, including expansion and improvement of the New Orleans, and for the financing thereof, adopted and carried through by the Missouri Pacific, was in itself fraudulent or reckless and improvident. As to the New Orleans, the plan contemplated that the Missouri Pacific would advance money to the New Orleans for betterments and additions on short time loans, and that at intervals when the indebtedness became of sufficient size bond issues would be sold to refund it. The worst of the depression came coincidentally with the time when such refunding was expected to be made and made the refunding impossible.

"From testimony frankly given by himself, and on the face of the record, it clearly appears as to the case Comstock presented to the court on the objections herein involved that after the report of the Senate subcommittee which criticized the Missouri Pacific management of the New Orleans, and in 1940, Comstock bought a few of the 5¼% Serial bonds at about 10 cents on the dollar and then employed an accountant to make studies of the accounts, records and reports of Missouri Pacific management of the New Orleans and based his charges on the accountant's studies. He tendered no extraneous or newly discovered evidence. As the period of Missouri Pacific alleged mismanagement of the New Orleans (1925 to 1933) had expired many years before Comstock acquired his interest in New Orleans stock, a court would not ordinarily have felt obliged at his instance to try the merits of charges of mismanagement committed in long past years and claimed to be provable by contemporaneous records which were at all times accessible. It would not sanction such buying into a lawsuit.

"But here the plan for Missouri Pacific reorganization was before the court to be approved or disapproved, according to whether it was or was not fair and equitable. The proposed plan included as one of its essential postulates that the New Orleans was indebted to the Missouri Pacific in a sum which with accumulated interest amounted to around eighteen million dollars. No judicial determination upon the validity of the debt had ever been made in any adversary proceedings throughout the thirteen year course of the Section 77 proceedings and bonds like Comstock's are outstanding in many hands aggregating some $13,500,000. Although the court was of opinion that not only Comstock but all other owners

of the Missouri Pacific 5¼% Serial Bonds secured by New Orleans stock who had at all times trustee representation and in great part representation by counsel, had been guilty of laches in failing for so many years to assert and present proof and try out before the Commission and the court the alleged invalidity of the debt almost entirely evidenced by the notes,[3] it concluded that judicial adjudication should be made as to the debt and that the court should, and therefore it did, hear the evidence covering the whole period of management of the New Orleans by the Missouri Pacific, and it tried out the whole case and all the charges presented by Comstock on the merits.

"The expert accountant called by Comstock produced a large number of exhibits which he had prepared from the books, records and reports of the individual companies and explained in connection with them the inferences he had drawn from his studies and expressed his opinions tending to support the Comstock charges. He centered his attack largely on that part of the accounting system of the railroads through which the New Orleans and its fourteen subsidiary railroads had been treated as a unit for financing purposes and the financial condition indicated by consolidated balance sheets. By disregarding the system character of all the Gulf Coast Lines held under New Orleans ownership he inferred a much less favorable financial position for the New Orleans than was shown by its consolidated balance sheets. He had no personal knowledge of the railroad operations or transactions covered by his testimony.

"[3] There was also at all times a substantial minority stockholding interest in the New Orleans with means to keep informed of the affairs of the regulated railroad corporation."

"The Group of Institutional Investors Holding First and Refunding Mortgage Bonds of Missouri Pacific and The Protective Committee for the holders of General Mortgage bonds of Missouri Pacific to sustain the burden of Missouri Pacific defense called as their witnesses on the trial the railroad men who had engaged, each in his own department, in all of the transactions and railroad operations and the records made thereof throughout the period involved, and they testified of and concerning matters with which they were intimately familiar. Also Mr. William Wyer, who after his graduation from Yale and Massachusetts Institute of Technology served in railroad construction and operation for the government during World War I, and in U. S. Railroad Administration during Federal Control, and afterwards in various positions in the Division of Operations, Division of Accounts and Assistant to the Comptroller. From 1920 to 1927 he occupied important positions with the Southern Railroad Company and the Denver Rio Grande and Western, the latter being 'fifty percent. owned by the Missouri Pacific so it was considered a part of the Missouri Pacific System.' In February, 1929, he became Assistant to the Chairman of the Board of Directors of the Missouri Pacific who was also Chairman of the Board of the New Orleans, and later in the year he became Secretary and Treasurer of the Missouri Pacific and an officer on all the subsidiaries, except as to the Texas and Pacific he was such officers for only six years. He handled a great many of the financial matters involving the Missouri Pacific and the New Orleans under the supervision of the Chairman of the Board of the Missouri Pacific. In 1933 he started studies which have provided substantially all of the studies upon which the various plans of reorganization have been based. He was at the

time of testifying the chief executive officer of the Central Railroad of New Jersey. He was thoroughly informed and conversant with the Missouri Pacific policies of system operation and of expanding and financing, and with the railroad operations and the financial transactions upon which the validity or invalidity of the debt in controversy depend, as well as the accounting and reporting system maintained for disclosing and reporting them. He had an important part in what was done, was in touch with substantially the whole course of the management of the New Orleans under attack and he gave his extensive testimony upon direct and cross examination with obvious understanding of its relevancy and importance. His testimony, supported by many accounting and summarizing exhibits, was to the effect that Missouri Pacific management of New Orleans was honest and was beneficial to New Orleans.

"Judge Moore, presiding at the trial, has exercised the jurisdiction in these Section 77 proceedings through most of their course, and his questions, comments and directions reflect his close attention to and understanding of the testimony and its application through the trial. His written opinion is reported 64 F. Supp. 64. His findings of facts and conclusions of law were drawn with care and thoroughness, and appear to us to be responsive to all the issues presented by the objections here involved and the evidence that was adduced, and the appellant has not called our attention to any refusal on the part of the court to make findings in respect to any other issues claimed to have been presented. The vast extent of the railroad business carried on by the Missouri Pacific and the New Orleans during the long past period of alleged mismanagement and the intricate corporate structures of the railroads, inevitably presented most

serious problems in the attempts of accountants to picture what their course of operations and financial transactions had been. The New Orleans had in some respects the character of a holding company in that it operated itself only a small fraction (around 11%) of the railroad mileage of its railroad system but owned the stocks and securities of some fourteen other railroad companies and was the only one of the group of railroads comprising its railroad system which had any relatively substantial amount of securities outstanding in the hands of the public. For financing purposes the individual roads in the group were dependent upon the New Orleans which, acting for the group in respect to financing, presented the necessary unitary functioning principal. There was fundamental controversy as to what inferences should be drawn from the available accounts to establish the true financial condition of the New Orleans at different times within the period and to establish and present the financial results of the railroad operations that were carried on. Mr. Wyer testified that the identified consolidated balance sheets compiled under direction of the Missouri Pacific and New Orleans officers were the summarizing records which were submitted to the Board of Directors to keep its members informed in the discharge of their duties. It was through the use of the consolidated balance sheets that the New Orleans and its affiliated railroads were treated as a unit in the financing of the companies throughout Missouri Pacific management. Though he could not say what went on in the minds of others, his testimony leaves no room to doubt that the Board members well understood how the computations were arrived at and that the members relied on them in the usual course of the financing of the business. He was intimately familiar with all phases of the ac-

counting in which they culminate, and although he admitted that perfection was never attained, his testimony together with that of the railroad officers and employees who did the work, fully justified the trial court's reliance upon the consolidated balance sheets in his findings and conclusions. But the disputes and conflicts of testimony in respect to the accounts and the inferences to be drawn were all issues of fact. The court recognized fully all the burden of obligation imposed by law upon the Missouri Pacific in respect to its management of the New Orleans and that if the Comstock charges could be proved and the indebtedness in issue was invalid or ought not in equity to be enforced against New Orleans stockholders, the then pending plan of reorganization could not stand.

"Comstock's contention that the court erroneously put the burden of proving his charges on him rather than requiring the Missouri Pacific to proceed first to disprove them, is without merit. As the execution of the promissory notes was admitted and at least formal proof of all of the items of advancements making up the debt had been in the record of the Section 77 proceedings for many years before the hearing, the court required only that all the records of the transactions that were questioned be made available for the hearing so that there was the equivalent of a full disclosure by the Missouri Pacific before Comstock was required to proceed with his proof of the charges. In its findings the court stated the facts as it found them to be proven by the whole evidence. It found in detail and in effect that the Missouri Pacific had administered the affairs of the New Orleans in good faith to the advantage of that company; had made the advancements to it for proper purposes; had not caused dividends to be paid out of capital or im-

providently in bad faith, and that the asserted indebtedness arose from advancement made by Missouri Pacific to New Orleans for betterments and additions and was valid and should be allowed in items specified, and that the plan of reorganization based as it was in part on recognition of the existence of the debt in question, was fair and equitable and conformable to the requirements of law regarding the participation of the various classes of creditors and stockholders."

We are confronted at the outset with petitioner's delay and conduct and its effect on the duty of this Court and that below to pass on the merits of his objections. Comstock, apparently with general knowledge of the conduct he alleges to be a wrong toward the securities which he now holds, bought them at about 10 cents on the dollar nearly seven years after the alleged misconduct had ended. Thus, it was not Comstock who was a victim of any wrongdoing but those in whose hands the securities depreciated to the low point at which Comstock bought. It is apparent that Comstock bought a grievance to exploit and to reap the advantage of its rectification. Those who realized the loss through sales to Comstock could, in no event, be indemnified in this proceeding. From every viewpoint, the delay in asserting these claims is unusual. The District Court found it also prejudicial due to the death of six named witnesses and participants, among others, whose testimony would be important. While it considered the objections barred by laches, it nonetheless adjudged their merits.

We think that, in the reorganization proceeding, the courts may entertain on their merits objections to a plan even if made by one who might be barred from asserting a cause of action in his own behalf, if the subject-matter of the objections is such that it goes beyond the objector's individual interests and affects the fairness and equity

of the plan. In view of the amount and position of the claim involved, we do not disagree with the Court of Appeals that such was the case here.

It also is true, as the court below indicates, that this objector made no effort to exhaust or to avail himself of administrative remedies in support of his objection. Neither the objection nor the evidentiary support for it were laid before the Interstate Commerce Commission in its hearings on successive plans of reorganization. The requirement that the Commission "hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report" to the court is not provided without a purpose and is not to be ignored by persons with claims or objections to be heard. This issue involved matters with which the Commission and its staff are especially qualified to deal. It has had no opportunity to express a view on this issue, which was allowed to go by default before it, and the courts do not have the benefit of the Commission's informed judgment on the matter involved. To by-pass the Commission and make the court the original forum for such contentions is not to be encouraged.

But the court did not refuse to hear the objections on their merits. In view of the functions cast upon the court in such cases, we cannot say that it may not, in its discretion, consider objections on their merits even though they have not been presented to the Commission. Some circumstances might be disclosed to indicate a remand for their consideration by the Commission. They might indicate that the courts would withhold approval, not out of deference to the objecting parties' rights but because of the broad responsibility laid upon the court for the equity and fairness of the plan as a whole. The court will be diligent to protect itself and the public from approval of unfair plans, even by default, and may take for its own use evidence no party would have a right

to force upon it. The court below evidently considered the circumstances of this case to warrant such inquiry into the merits, and we do not inquire whether the discretion was wisely exercised.

The case on the merits presents, as to several different and complicated transactions, a single question of law. It is said that our decision in *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, requires that the claim of Missouri Pacific against the New Orleans be disallowed and petitioner's objections sustained. In that case this Court reformulated for application to reorganization cases a wholesome equity doctrine to the effect that a claim against a debtor subsidiary be disallowed or at least subordinated when the claimant corporation has wholly dominated and controlled the subsidiary and in the transactions creating the debt has breached its fiduciary duty and acted both to its own benefit and to the detriment of the debtor. As we later said of the decision, "This was based on the equities of the case—the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary by Standard to the detriment of the public investors." *Pepper* v. *Litton,* 308 U. S. 295, 308.

Petitioner asks us to declare the same result in this case despite explicit and unchallenged findings that, in its dealings with New Orleans during the period involved, "the Missouri Pacific acted in good faith and with due regard to its obligations, legal and equitable, to the New Orleans and its security holders," that the "effect of the control by the Missouri Pacific of the Gulf Coast Lines was beneficial and advantageous to the New Orleans and the holders and pledgees of its securities," that all dividends in question "were paid either out of the earned surplus of the New Orleans available for dividends or out of the net income of the New Orleans after payment of all prior charges against income," and that the sub-

ordination of the claim as asked "would unjustly enrich the holders of the Capital Stock of the New Orleans and the holders of the Secured Serial Bonds," as well as other more detailed findings to the same effect.

In the case before us there was domination of the subsidiary, a relationship between corporations which the law has not seen fit to proscribe. By the application of long-standing principles of equity this Court fashioned the rule in the *Taylor* case to prevent a fiduciary in such a position from enriching itself by breach of its trust. It is not mere existence of an opportunity to do wrong that brings the rule into play; it is the unconscionable use of the opportunity afforded by the domination to advantage itself at the injury of the subsidiary that deprives the wrongdoer of the fruits of his wrong. On the findings in this case, the claim of Missouri Pacific was the outgrowth of complicated but legitimate good faith business transactions, neither in design or effect producing injury to the petitioner or the interests for which he speaks.

Special emphasis has been placed on the fact that under control of the Missouri Pacific dividends were paid by the subsidiary at a time when it was borrowing money represented by this claim. It is clear from the findings that the dividends were paid out of current earnings or surplus, and not in violation of law or contract. Only in 1929 did New Orleans earn currently sufficient to pay its dividends. Nevertheless in all three years there was sufficient earned surplus legally to permit dividends. Heavy investments in improvements may require borrowings for dividends; but no law or public policy requires a corporation to finance capital additions out of earnings or to pass dividends because of low current earnings when past earnings are available for dividend purposes. These past earnings may be used to compensate the capital that produced them, and capital additions may be made from funds borrowed or raised by issues of capital securities,

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so long as the authorizations required in the case of railroads are obtained. No question is raised as to the authority to borrow.

While the contemporaneous borrowing to pay for capital additions, and payment of dividends, is not in itself illegal, it would, of course, come under the ban of the *Taylor* decision if it were carried out in breach of good faith for the advantage of the holding company to the detriment of the subsidiary. But the findings of good faith, fair dealing and freedom from fraud or overreaching cover the dividend policy as well as other questioned transactions. Such being the facts, the allowance of the claim is not error of law.

The findings here do not stop with holding that the questioned transactions were intended to and did benefit the system as a whole. An over-all benefit to the system might be attained at the injury of one of its units and the security holders of that unit. But here the finding of good faith and of benefit applies to the New Orleans and its security holders as well as to the system generally. The finding is unequivocal that the control of Missouri Pacific not only was "in good faith and with due regard to its obligations, legal and equitable, to the New Orleans and its security holders," but also that its control of the Gulf Coast Lines "was beneficial and advantageous to the New Orleans and the holders and pledgees of its securities." The criticised transactions are thus not only exonerated of evil or illegal intent but are also established as beneficial rather than injurious to the interests which now challenge them. The findings to that effect are entitled to special weight where, as here, they are based on the District Judge's complete familiarity with the case. *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R. Co.*, 328 U. S. 495, 533. Affirmed by the Circuit Court of Appeals, they are, under the rule concerning concurrent findings, and on the basis of our grant of certiorari, conclusive in this Court.

Disallowance of petitioner's objections on such findings was not error of law. In this view of the case we need not consider questions tendered as to validity or effect of the issuance of notes or of their pledge.

The judgment below in No. 451 is

Affirmed.

Petitions in Nos. 452, 453 and 454 were addressed to dismissals by the Court of Appeals from the same order as No. 451 but taken in different names. The petitions were filed as safeguards against procedural objections to review of the order. The writs in these cases are dismissed.

MR. JUSTICE MURPHY, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE agree, dissenting.

The rule that makes concurrent findings of fact by two courts below binding on us in the absence of some very exceptional error is a wise one. But it is not a rule to be applied in a blind manner simply because a case involves a complex factual situation. In my view, there is an exceptional error involved in the conclusions reached by the District Court and affirmed by the Circuit Court of Appeals, an error that is apparent on the face of the District Court's findings. And since this error is not sufficiently illuminated by the opinion of the Circuit Court of Appeals, 163 F. 2d 350, as quoted by the majority in this Court, I deem it essential to make an independent statement of the relevant facts as found by the District Court.

This case grows out of the joint reorganization of the Missouri Pacific Railroad Company and affiliated railroad corporations under § 77 of the Bankruptcy Act, 11 U. S. C. § 205. It involves a claim of $10,565,226.78 filed by the Missouri Pacific against one of its subsidiaries which was also undergoing reorganization and the application to that claim of the so-called Deep Rock doctrine enunciated in *Taylor* v. *Standard Gas Co.*, 306 U. S. 307.

It is unnecessary for present purposes to detail the long, complicated and still unfinished proceedings which have marked the reorganization of the Missouri Pacific railway system. The instant proceeding is directly related to a revised plan of reorganization approved in 1944 by the Interstate Commerce Commission. The District Court below then heard objections to the plan by various parties in interest. Included among them was the petitioner Comstock. He stated that he owned $80,000 principal amount of the 5¼% Secured Serial Gold Bonds of the Missouri Pacific. His objections were filed on behalf of himself, of fourteen other public investors holding in excess of $900,000 additional principal amount of these bonds, and of all other owners and holders of the bonds. A committee of these bondholders, representing an additional $315,000 principal amount of the bonds, also joined in Comstock's objections. Of the total principal amount of these bonds publicly outstanding, about 11½% were specifically represented by Comstock.

Comstock's objection No. 19, which is our sole concern, related to the validity and priority of a $10,565,226.78 claim filed by the Missouri Pacific (hereinafter called MOP) against its subsidiary New Orleans, Texas and Mexico Railway Co. (hereinafter called NOTM) in the joint reorganization proceedings. It appears that MOP had acquired the controlling interest in NOTM's common stock in 1924 and had completely dominated and controlled NOTM until the reorganization proceedings began in 1933. MOP's claim against NOTM was based upon "cash advances for operation, interest payments, etc. at various times from March, 1929 to February, 1933, both inclusive." Most of the NOTM stock which MOP held was pledged as security for the class of MOP 5¼% secured bonds which Comstock owned, the pledge constituting 82% of the outstanding shares of NOTM's sole class of stock. MOP sought to put its claim against

NOTM ahead of the claims of the holders of these MOP bonds who looked to the NOTM common stock for security. The revised plan of reorganization gave effect to MOP's desire in this respect.

A separate hearing was held by the District Court on Comstock's objection No. 19. After carefully considering the voluminous and complicated evidence adduced at this hearing, the court entered a separate order overruling the objection and holding that the $10,565,226.78 claim should be allowed in full; with interest, this claim now aggregates more than $18,000,000. The court further held that this claim, so allowed, was entitled to priority over the claims of the public investors holding MOP 5¼% secured bonds. In addition, the court felt that objection No. 19 was not timely and should be barred from consideration under the doctrine of laches.

At the same time, the District Court entered another order overruling the other objections raised by Comstock and the other parties in interest and approving the revised plan of reorganization. An opinion was then filed detailing the reasons for the two orders. *In re Missouri Pacific R. Co.*, 64 F. Supp. 64. Comstock appealed from the order dismissing his objection No. 19.[1] The Eighth Circuit Court of Appeals affirmed the District Court's

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[1] The leading party opposing Comstock on this appeal was the Group of Institutional Investors, holding first and refunding mortgage bonds of MOP. This group represented less than 10% of such bonds and admitted that it had "no financial interest in the controversy revolving about" the MOP claim, its only interest being to expedite a reorganization plan then under consideration. But this group offered the only evidence in the District Court in support of the MOP claim. Another party was the NOTM mortgage and income bondholders committee, which also admitted it had no direct interest in the MOP claim litigation. Other parties included MOP, the MOP common and preferred stockholders committees, the MOP trustee, Alleghany Corporation, and certain groups of creditors and indenture trustees. These parties are now respondents before us.

action on this objection, holding that the findings of that court were not clearly erroneous. *Comstock* v. *Group of Institutional Investors,* 163 F. 2d 350. At the suggestion of the Interstate Commerce Commission, the Circuit Court of Appeals then remanded the revised plan of reorganization back to the Commission for reconsideration and revision. *Wright* v. *Group of Institutional Investors,* 163 F. 2d 1022. The Commission has not yet disposed of the matter.

I.

For somewhat different reasons than those advanced by the Court, I agree that a judicial consideration of Comstock's objection No. 19 is not now precluded by the doctrine of laches.

The joint reorganization proceedings commenced in 1933. Comstock did not purchase any of the MOP 5¼% secured bonds until 1940, soon after a Senate subcommittee investigating railroads issued a report criticizing the MOP management of NOTM. S. Rep. No. 25, Part 9, 76th Cong., 3d Sess. He then bought some of the bonds at about 10 cents on the dollar and employed an accountant to study the relationships between MOP and NOTM prior to 1933. Not until 1943 did Comstock suggest that there might have been some irregularities on the part of MOP. And not until November, 1944, when he filed his objection No. 19 to the revised plan of reorganization, did he really press his allegations.

Prior to Comstock's objection, more than a decade of the reorganization process had produced no charge or revelation of impropriety as to MOP's $10,565,226.78 claim against NOTM. Numerous investigations and hearings had been held during that long period concerning the pre-reorganization administration of the affairs of MOP and its subsidiaries. The public holders of the MOP 5¼% secured bonds and other creditors had ample

opportunity to question the allowance of the claim. But no charges were made until after Comstock purchased his bonds and conducted his own investigation. Many of the events to which objection No. 19 relates took place more than twenty years ago; and some of the persons who had personal knowledge of those events and who might have been able to testify in regard thereto are now dead.

I do not believe, however, that the doctrine of laches is properly applicable to the facts of this case. The District Court had before it a revised plan of reorganization of MOP and its subsidiaries, a plan which recognized that NOTM was indebted to MOP and which permitted MOP to collect that debt without subordination to other creditors. That court was duty bound to test this portion of the plan by the fair and equitable rule and to approve it only if the rule was found to be satisfied. *American Ins. Co.* v. *Avon Park,* 311 U. S. 138, 145–146. The court's duty was nonetheless existent because an attack on the MOP claim came late in the day. Comstock's objection served only to emphasize the circumstances surrounding this indebtedness and to give the court an opportunity to inquire into the matter more fully than it might otherwise have done. Moreover, the fact that this objection had not previously been raised and adjudicated in the § 77 proceedings added to the appropriateness of a judicial determination of the validity of the debt at this juncture. Only by examining the matter now could the court be certain whether the treatment accorded the debt by the reorganization plan was fair and equitable.

The motives which led Comstock to acquire his bond holdings and to raise his objection No. 19 are not pertinent to the performance of the District Court's duty of testing the fairness of the reorganization plan. Nor is it decisive under these circumstances that the objection might have been raised earlier by Comstock or some other

bondholder. It is enough that the matter was presented in an appropriate fashion at a time when the court was compelled to pass judgment upon the reorganization plan and at a time when no prejudicial change in the position of other parties had yet occurred.

In this connection, it is noteworthy that the Interstate Commerce Commission at an early stage in the § 77 proceedings held that the validity of the MOP claim is a matter "for litigation in the Courts." Thus Comstock would likely have been unsuccessful had he attempted to secure a determination of his objection by the Commission before going to court. The Court today, however, expressly holds that the Deep Rock issues raised by Comstock involve matters over which the Commission has jurisdiction and with which it is especially qualified to deal. See *Schwabacher* v. *United States*, 334 U. S. 182. On this phase of the case, I am in agreement with the Court. The Commission should determine the applicability of the Deep Rock doctrine to railroad reorganization plans which it formulates. But since the Commission had previously refused to adjudicate the merits of the MOP claim and since Comstock's objection has been thoroughly aired in the District Court, it is inappropriate to remand the case now to the Commission for an expression of its views.

Despite the claimed difficulties due to the age of the pertinent events and the death of some of the witnesses, the District Court was able to give a comprehensive treatment to Comstock's objection and to render an informed judgment on the fairness of MOP's claim against NOTM. Many of the issues revolved about written evidence and statistics. And the court was able to draw upon its intimate knowledge of the MOP-NOTM relationships, knowledge gained from long association with the reorganization proceedings. Hence the court could and did perform fully its function as to that portion of

the revised reorganization plan with which objection No. 19 was concerned.

In this situation, the desirability and necessity of determining the fairness and equitableness of MOP's claim far outweigh any possible inconvenience caused by the late presentation of the matter.

II.

In *Taylor* v. *Standard Gas Co., supra,* this Court established the principle that where a parent corporation has not only dominated but has mismanaged a subsidiary corporation, which is presently in bankruptcy or reorganization, and where the parent has a claim which is intimately related to the mismanagement, a court may refuse to permit the parent to assert the claim as a creditor except in subordination to the claims of the subsidiary's other creditors and preferred stockholders. This principle, which has become known as the Deep Rock doctrine, is equitable in nature. As explained in *Pepper* v. *Litton,* 308 U. S. 295, 308, the doctrine was applied in the *Taylor* case on the basis of "the equities of the case—the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary by Standard to the detriment of the public investors."

The fulcrum of Comstock's objection No. 19 is the Deep Rock doctrine. The argument is that the items constituting the $10,565,276.78 claim filed by MOP against NOTM are impregnated with MOP's alleged mismanagement of NOTM and that the claim should therefore be subordinated to the claim of the public investors in the MOP 5¼% secured bonds, who are secured by MOP's pledge of the NOTM common stock.

It is no answer to Comstock's claim that the District Court found that the transactions giving rise to the MOP claim were carried out in good faith. The equities which form the Deep Rock doctrine relate not alone to matters

of bad faith. They are also concerned with the essential fairness and propriety of transactions from an objective standpoint. *Pepper* v. *Litton, supra,* 306. Like negligence, inequity may be present where there is the utmost subjective good faith. If there is mismanagement and if there is undue harm to the creditors and preferred stockholders of the subsidiary, the Deep Rock doctrine dictates subordination of the parent's claim. And if there be good faith on the part of the parent's officers, it hardly justifies ignoring the injury to the subsidiary's creditors and stockholders. Equity looks in all directions. Only in that way can the various interests in the corporate community be adequately protected.

Moreover, the issues raised by Comstock are not resolved by the District Court's finding that operational benefits accrued to NOTM and its subsidiaries by virtue of the transactions underlying MOP's claim. These transactions were undoubtedly tied in with the expansion program which MOP was undertaking during this period. But a breach of fiduciary obligations is not to be condoned by the presence of accompanying benefits where the subsidiary's assets are depleted to the injury of the stockholders and creditors of the subsidiary.

Nor does the fact that MOP, the parent, is insolvent bar an application of the Deep Rock doctrine to the facts of this case. The insolvency of the parent and the consequent effect of subordination upon the parent's innocent creditors are certainly factors to be considered. See *Consolidated Rock Co.* v. *Dubois,* 312 U. S. 510, 524; *Prudence Corp.* v. *Geist,* 316 U. S. 89, 97. But they are not necessarily decisive in all cases. The equities of a particular situation may turn upon something more than the solvency or insolvency of the parent. It may well be that a balancing of competing equities reveals that it is unjust to permit the advantages arising from

the parent's breach of fiduciary duties to adhere to the benefit of the innocent creditors of the insolvent parent. Some other innocent parties may have an overriding interest which justifies subordination of the claim. Or the claim itself may be so tainted with inequity and unenforceability as to require subordination regardless of the parent's insolvency. And so the Deep Rock doctrine is as broad and as narrow as the equities in each case.

In this instance, I believe that the public holders of the MOP 5¼% secured bonds have a sufficiently direct and overriding interest in the financial well-being of NOTM to justify subordinating the MOP claim should it appear that this claim is intimately associated with a breach of MOP's fiduciary duties. MOP secured these bonds with a pledge of the NOTM common stock and expressly undertook not to impeach the pledge. Any wrongful conduct by MOP which diminished the size of NOTM assets would impair the value of the NOTM stock. Subordination of the claim would thus tend to make the NOTM stock more valuable and to make possible a realization of MOP's express pledge to its bondholders. True, creditors of MOP other than the bondholders would be unable to benefit from whatever could be collected on the claim. But they were not the recipients of a pledge of NOTM stock and they lacked the immediate interest that the bondholders had in a proper performance of MOP's fiduciary duties. The indirect loss they would suffer by subordination is outweighed by the direct injury to the bondholders as a result of allowing the claim.

It is therefore essential to study the various transactions in detail to determine whether they represent the type of mismanagement by a parent which leads to subordination of the resulting claim against the subsidiary.

III.

The District Court found that during the period from March, 1929, to February, 1933, MOP advanced to NOTM the net sum, after deducting principal payments, of $10,565,226.78—which constitutes the claim in issue. Included in these advances was the greater portion of the $2,795,000 loaned to NOTM between November 30, 1928, and November 27, 1931, to make additions and improvements to the railroad properties of NOTM and other related subsidiaries. But each time one of these advances was made, there was an almost simultaneous payment of a dividend by NOTM on its stock, which was largely owned by MOP. This phenomenon is demonstrated in the following table:

Dates of—		Advances by MOP to NOTM	Dividends by NOTM	
Advances	Dividends		Total amount	Amount to MOP
Nov. 30, 1928	Dec. 1, 1928	$300,000	$259,576	$233,231
Feb. 28, 1929	Mar. 1, 1929	250,000	259,576	234,237
Aug. 31, 1929	Sept. 3, 1929	275,000	259,576	239,429
Nov. 29, 1929	Dec. 1, 1929	310,000	259,576	241,529
Feb. 28, 1930	Mar. 1, 1930	260,000	259,576	242,072
May 31, 1930	June 1, 1930	275,000	259,576	242,212
Nov. 29, 1930	Dec. 1, 1930	300,000	259,576	243,360
Feb. 25, 1931	Feb. 28, 1931	75,000	259,576	243,510
May 27, 1931	June 1, 1931	200,000	259,576	244,387
Aug. 29, 1931	Aug. 31, 1931	250,000	259,576	244,527
Nov. 27, 1931	Nov. 30, 1931–Dec. 1, 1931.	300,000	259,576	244,527
		*$2,795,000	$2,855,336	$2,653,021

*It is contended by the respondents that this figure should be reduced to $2,082,456, since the first two advances in November 1928, and February 1929, were repaid and since the excess of the advances over the dividends should not be counted.

It is said, however, that MOP's action in making these loans and receiving back the dividends followed a natural pattern of a company devoted to improving the properties of its subsidiaries, there being merely a "near coincidence as to the dates of certain dividends and advances."

Reference is made in this respect to the relationship which MOP bears to the various companies in the Gulf Coast Lines system (hereinafter called GCL). In 1924, MOP acquired a controlling interest in NOTM and thereby inherited complete control of the GCL system, the rail lines of which are interlaced with others in the MOP system. NOTM at all times has been primarily a holding company owning all the stocks and bonds of the fourteen subsidiary companies constituting the GCL group, NOTM itself operating only about 11% of the total GCL mileage. Of the GCL operating companies, the St. Louis, Brownsville and Mexico Railway Co. (hereinafter called Brownsville) is the most important, operating about one-third of the GCL mileage and contributing from 61% to 84% of the group's income during the period in question. NOTM is the only one of the GCL group which has securities outstanding in the hands of the public.

According to the District Court findings, MOP's policy in advancing the $2,795,000 to NOTM was to reimburse NOTM's treasury for additions and betterments to the properties of the GCL system. NOTM acted as banker for that system. The GCL subsidiaries were not in a position from 1925 to 1930 to finance their own improvements except out of earnings and by borrowing from NOTM. Most of their freight revenues were cleared through NOTM; as these items were received by NOTM, they were credited against the obligations created by the loans from NOTM to the subsidiaries. But since the total requirements of the subsidiaries for operating expenses, dividends and improvements were in excess of the receipts, the unpaid accounts mounted. Finally MOP had to begin loaning money to NOTM to cover these accounts. It is in this way that MOP's advances are said to have been directed toward the improvement program of the GCL system.

It is vigorously denied that these MOP advances were in any way used to pay for the almost simultaneous dividends from NOTM to MOP, such a contention being termed "superficial" and contrary to "basic principles of accounting." In support of that denial, an illustration is used. Assume that NOTM receives $200,000 cash from net earnings on January 31, when it is known that this amount will be needed to pay a bill for a new freight yard for a subsidiary. NOTM also knows that on April 1 a $100,000 cash dividend to MOP will be due. Instead of borrowing to pay for the new freight yard, NOTM uses the $200,000 cash for that purpose. Then, three days prior to the dividend date, NOTM borrows $100,000 from MOP to reimburse the NOTM treasury in part for the investment in the new freight yard. This saves NOTM about two months' interest on $100,000 of the money spent for the freight yard. The fact that a $100,000 cash dividend is paid three days after the $100,000 loan is thought to be a mere coincidence, the dividend and the loan having no connection.

But in this illustration it is obvious that NOTM has insufficient cash to finance both the $200,000 freight yard and the $100,000 dividend. It has to borrow money for one purpose or the other. But to say that it here borrows $100,000 to help pay for the freight yard is unrealistic. NOTM has enough cash to pay for the freight yard and it uses the cash just for that purpose. Two months later it has the choice of (1) borrowing $100,000 and paying the dividend, or (2) not borrowing the money and not paying the dividend. It chooses the former course of action. By such action, NOTM has borrowed money to pay a dividend.

The foregoing illustration indicates what the record in this case amply demonstrates—namely, that the MOP advances found by the District Court to have been for the payment of GCL improvements were in reality ad-

vances for the payment of dividends by NOTM, dividends which for the most part went to MOP. Considered as a separate entity, NOTM rarely had enough income from the time MOP acquired control in 1924 to the start of reorganization in 1933 to pay the regular dividends; loans were essential if MOP was to continue to receive its share of these dividends.

Year	Net income	Dividends
1925	$839,679.00	$1,038,198
1926	1,393,806.58	1,038,198
1927	937,098.90	1,038,198
1928	742,058.00	1,038,198
1929	1,153,257.54	1,038,198
1930	854,139.71	1,038,198
1931	*399,487.80	1,038,198
1932	(−951,607.76)	None

*After deduction of $3,155,000 for that portion of the dividends on Brownsville stock held by NOTM which was unpaid in 1931.

After studying these dividends from NOTM to MOP, the subcommittee of the Senate Committee on Interstate Commerce investigating railroads (composed of Senators Wheeler and Truman) concluded as follows:

"The N. O. T. & M. itself never earned enough to pay these dividends. In none of the 6 years, 1926 through 1931, did the N. O. T. & M. earn more than $605,000 (exclusive of dividends from its subsidiary, the St. Louis, Brownsville & Mexico). In 3 of the 6 years, the road showed a deficit after fixed charges. For the 6-year period considered as a whole its stated net income totaled a bare $90,000 (as against dividend declarations totaling $6,300,000).

"Even the $90,000 net income figure was a considerable overstatement. Each year the N. O. T. & M. regularly included in its operating expenses a certain sum for depreciation of its equipment. Consistently, year after year, the amount charged for depreciation was inadequate. A

statement from the files of the railroad itself shows that for the period 1926 through 1930 the N. O. T. & M.'s net income was overstated (through understatement of depreciation) by more than $411,000. If the railroad's depreciation had been adequately charged, it would have shown a deficit for the 6 years 1926–1931 of $321,000 after fixed charges. Yet during this period the Missouri Pacific took $5,580,000 in dividends out of the N. O. T. & M." S. Rep. No. 25, Part 9, 76th Cong., 3d Sess., pp. 2–3.

The consolidated picture of NOTM and its GCL subsidiaries was equally indicative of the lack of an ability to pay dividends to MOP without borrowing.

Year	Net income	Dividends
1925	$2, 547, 633	$1, 038, 198
1926	1, 783, 278	1, 038, 198
1927	(−202, 438)	1, 038, 198
1928	956, 433	1, 038, 198
1929	845, 064	1, 038, 198
1930	674, 950	1, 038, 198
1931	(−1, 122, 422)	1, 038, 198

Care was taken, however, to avoid the appearance of borrowing from MOP to pay dividends to MOP, a practice of doubtful legality. Whenever it was found that NOTM had inadequate income to meet a prospective dividend payment, MOP officers would direct Brownsville, NOTM's principal subsidiary, to take steps to declare a dividend on its stock, all of which was held by NOTM. Usually this dividend was the precise amount by which NOTM lacked money to pay its own dividend.[2] But Brownsville invariably was unable to

[2] The method by which MOP would bring about the Brownsville declaration of dividends is shown by the following typical exchange of letters between NOTM and MOP officials:

"Houston, January 10th, 1931

"Mr. L. W. Baldwin: The net income of the NOT&M for the three months ending November 30th, 1930, reflects a deficit of $56,613.10,

make a cash payment of its dividends to NOTM and many of its pre-1931 dividend declarations were considered collected by NOTM only at the expense of leaving unpaid Brownsville's debts to NOTM for essential supplies. These paper dividend declarations were capped in 1931 when Brownsville was ordered to declare dividends to NOTM of $4,155,000; in that year Brownsville earned but $398,000. The Bureau of Accounts of the Interstate Commerce Commission in 1936 informed NOTM that these 1931 dividends were declared at a time when NOTM was aware that Brownsville "was without funds to pay it, and even on the basis of past experience, the earnings of the company, had business continued good, would not have been adequate to make the payment until some future date." This fact rendered the divi-

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which is $316,188.85 short of quarterly dividend requirement of the NOT&M due December 1st, 1930.

"I am attaching hereto statement showing result of operations for the months of September, October, and November 1930.

"Following past practice, we will arrange for Mr. Cole to list for action at the next meeting of the Board of Directors of the StLB&M [Brownsville], a resolution providing that dividend be declared out of the surplus of the StLB&M in favor of the NOT&M.

"H. R. SAFFORD.
"F."

The reply to the foregoing letter follows:

"St. Louis, Mo., January 13, 1931

"Mr. Safford: Referring to your letter of January 10th, file 482–2, with reference to declaring dividend out of the surplus of the St. Louis, Brownsville & Mexico Railway Company in favor of the New Orleans, Texas & Mexico Railway Company.

"It will be satisfactory to handle this in line with your letter.

"L. W. BALDWIN,
"Per C. D. P."

On June 17, 1931, Brownsville declared a dividend of $316,188.85, the precise amount of the NOTM deficit; the dividend was declared effective as of November 30, 1930, one day prior to the dividend date for NOTM's stock.

dends improper under Commission rules. And while it was too late to correct the income accounts of NOTM which had already been closed, NOTM was directed to write off the unpaid portion of the 1931 dividends (some $1,400,000) through profit and loss.

This 1931 incident grew out of the fact that NOTM was operating that year at a great loss. It began that year with a profit-and-loss balance of only $709,000 and operated at a loss of $606,000. It also had to charge off $875,000 to correct its former inadequate depreciation accruals. By the end of 1931, NOTM would have shown a debit profit-and-loss balance of $772,000 or more. MOP, of course, was demanding payment of the usual $1,038,000 dividend for the year. "The problem was solved as it had been solved in previous years—by milking the Brownsville. But this time the milking would have to be thorough. . . . The solution found was to cause the Brownsville to declare an extraordinary dividend of $3,500,000—a dividend seven times the par value of the stock upon which it was declared. Other Brownsville dividends to the N. O. T. & M. brought the total for the year to $4,155,000, enough to fill up the N. O. T. M.'s profit-and-loss deficit and to enable the latter to declare a $1,038,000 dividend in favor chiefly of the Missouri Pacific." S. Rep. No. 25, Part 9, 76th Cong., 3d Sess., p. 10.

Thus the Brownsville dividend declarations gave NOTM earned surpluses on paper without giving it any cash with which to pay its dividends to MOP. Dividends declared by Brownsville were entered as income to NOTM even though they were not paid. An ostensible legal basis was thereby established for a declaration of dividends to MOP. NOTM would then borrow money from MOP to pay for those dividends. This again was largely a paper transaction. The earned surplus upon which the Court today places great reliance in affirming the District Court's findings was but a figment of the

MOP imagination. "The intricate accounting devices evolved by railroad and holding company officials in an attempt to legalize dividend payments unjustified by earnings resulted, both in 1930 and in 1931, in the payment of N. O. T. & M. dividends out of capital, a procedure disguised in 1930 behind faulty bookkeeping and in 1931 behind an out-and-out violation of Interstate Commerce Commission accounting regulations." S. Rep. No. 25, Part 9, 76th Cong., 3d Sess., p. 14.

By advancing to NOTM $2,795,000, MOP received back $2,654,000 in dividends within a few days after the various loans, making a total net advance of $141,000. MOP's cash position was unaffected by these various transactions, the NOTM dividends merely giving it a paper profit-and-loss balance out of which to declare its own dividends. Hence MOP, like NOTM, was forced to borrow money; it did so from outside sources. Yet MOP now seeks to claim nearly all of the $2,795,000 plus interest, an aggregate of about $4,795,000, for engaging in these bookkeeping transactions and for extending credit to the extent of $141,000.

NOTM's fiscal affairs in this respect have certainly not "been conducted with an eye single to its own interests" within the meaning of the Deep Rock doctrine. *Taylor* v. *Standard Gas Co., supra,* 323. Nor can these transactions be said to meet the test of "inherent fairness" and the requirement of an "arm's length bargain," which are essential ingredients of that doctrine. *Pepper* v. *Litton, supra,* 306–307. Here, as in the *Taylor* case, dividends were declared in the face of the fact that NOTM had not the cash available to pay them and was, at the time, borrowing in large amounts from MOP. And see *In re Commonwealth Light & Power Co.,* 141 F. 2d 734, 738. Compelling a subsidiary to pay dividends under these circumstances is the type of mismanagement by a parent which leads to the subordination of the resulting indebtedness.

IV.

Another part of the $10,565,226.78 MOP claim related to an intercompany adjustment of $1,261,009.84 made during October, 1932, at the height of the depression and shortly before the § 77 proceedings began.

The International-Great Northern Railroad Co. (hereinafter called the I-GN) was a subsidiary of NOTM, although not deemed a part of the GCL system. I-GN had advanced cash or delivered materials to ten of NOTM's GCL subsidiaries; as of October 31, 1932, these ten companies were indebted to I-GN in the sum of $1,261,009.84 on account of these transactions. On the same date, I-GN was indebted to MOP in an amount in excess of $1,261,009.84.

It was known at this time that the I-GN claims against the NOTM subsidiaries were presently uncollectible. It was also apparent that NOTM was in better financial health than I-GN. MOP, which was then in need of loans from outside sources, sought to improve its own financial condition by shifting debtors. It did this by increasing its claim against NOTM by $1,261,009.84 and by decreasing its claim against I-GN by that same figure. To make this bookkeeping shuffle possible, I-GN credited NOTM and its other subsidiaries with the payment of the $1,261,009.84 debt which those subsidiaries owed. MOP then credited I-GN with payment of a like amount, crediting it against I-GN's debt to MOP. NOTM thereby found itself obligated to pay MOP an additional $1,261,009.84. Appropriate entries were made, of course, in the journals of the affected companies.

NOTM had not previously been liable to pay this amount to MOP; nor did it receive anything of value from MOP in return for assuming the debt. Yet no valid reason is suggested why NOTM should have been forced to shoulder this obligation, thereby decreasing the assets available to its creditors and stockholders. Cer-

tainly it was not essential, as has been claimed, that NOTM acquire the debt to protect its ownership and control of its GCL subsidiaries. NOTM was invulnerable in that respect, owning all the securities of the subsidiaries, and the addition of this debt added no new protection. The contention is also made that NOTM owed a fiduciary obligation to I-GN, its subsidiary, and that it was NOTM's duty to relieve I-GN of any uncollectible items owed by other NOTM subsidiaries. The fiduciary obligation grows out of the fact that NOTM owned all the securities of its GCL subsidiaries. This contention is closely allied to the theory that NOTM and the subsidiaries are a single financial entity and that it is immaterial which company within that entity is liable for the debt. But the close relationship of NOTM and its GCL subsidiaries does not legitimatize the intercompany adjustment from an equitable point of view. In this situation, we are dealing with the rights of creditors and stockholders who are directly interested in the financial well-being of NOTM as an enterprise separate and distinct from its subsidiaries. Hence it is necessary here to recognize and give effect to the corporate distinctions between NOTM and its GCL subsidiaries.

The resulting picture is one of a bookkeeping write-up of NOTM indebtedness at a time when NOTM was on the threshold of reorganization. NOTM received nothing whatever to compensate for the increase in its debt structure. The increase served only to enable MOP, the parent, to possess what was thought to be a more favorable creditor's position. Such treatment of a subsidiary's debt structure does not square with a parent's fiduciary position. A subsidiary is entitled to be saddled by a parent only with those debts which may fairly be allocated to it, debts which grow out of legitimate business transactions. To transfer debts promiscuously from one subsidiary to another merely to augment the parent's

creditor status is to inflict an injustice upon the creditors and stockholders of the subsidiary to which the debt is shifted. It is a type of mismanagement of a subsidiary which properly calls the Deep Rock doctrine into operation, causing the subordination of the parent's claim for the amount of the transferred debt.

V.

The remainder of the $10,565,226.78 claim concerned the advances made by MOP to NOTM to acquire five Texas "feeder" railroad lines at a cost of over $5,500,000.

Comstock's contention in this respect is that the acquisition of these lines was for the sole benefit of MOP and I-GN, rather than for NOTM or the GCL system. Reference is made to a statement of the Interstate Commerce Commission that these "feeder" lines "were really acquired for the benefit of the entire [MOP] system, and . . . they have usually been operated at a deficit since acquisition." *Missouri Pacific R. Co. Reorganization,* 239 I. C. C. 7, 71. Moreover, some of the "feeder" lines are said not to connect at all with the lines of NOTM or its GCL subsidiaries. And it is thought that some of the MOP advances were used to cover operating deficits of the acquired property. Such is the basis of the objection to the recognition of MOP's claim against NOTM for the cost of the "feeder" lines.

There is nothing in the record to support an application of the Deep Rock doctrine to this aspect of MOP's claim. The use of NOTM to acquire subsidiary rail lines which have subsequently been operated at a loss does not necessarily indicate improper action by MOP; a mere mistake in business judgment may be all that was involved. And the fact that the acquisition may have been primarily for the benefit of some part of the MOP system other than the GCL companies does not necessarily mean that the

acquisition was outside the legitimate scope of the functions of NOTM, a holding company in the MOP system.

Indeed, the main thrust of Comstock's objection to this segment of the MOP claim is directed toward the entire history of MOP's management of NOTM. The thought is that the relationship of the parent and the subsidiary has been so complex and so saturated with mismanagement as to warrant subordination of the entire claim of the parent without bothering to differentiate between particular transactions. See *Taylor* v. *Standard Gas Co., supra,* 323. But the record does not support such an approach to the MOP-NOTM relationship. There have been, as we have seen, two examples of mismanagement on MOP's part that warrant the application of the Deep Rock doctrine. But those situations are separable in nature from the other transactions between MOP and NOTM. And the Deep Rock doctrine is not one that operates to bar an entire parental claim if only a separable portion of it is inequitable. It is only where, as in the *Taylor* case, the parent-subsidiary relationship has been so complex that it is impossible to restore the subsidiary to the position it would have been in but for the parent's mismanagement that the entire claim may be subordinated without distinguishing the good transactions from the bad. Such is not the situation in this case.

VI.

From the findings of the District Court and the uncontested facts in the record, I can only conclude that of the $10,565,226.78 MOP claim, the portion of the $2,795,000 relating to dividend advances during the period in question and the $1,261,009.84 relating to the intercompany bookkeeping transaction should be subordinated to the claims of the pledgees of NOTM stock. In holding otherwise, the District Court committed an error which this Court should not overlook.

TAYLOR *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 721. Argued April 30 and May 3, 1948.—Decided June 21, 1948.

1. The Alabama procedure, whereby a trial court of that State, by writ of error *coram nobis,* may set aside its own judgment in a criminal case because of an error of fact not apparent on the common law record, is a procedure long recognized by the common law and constitutes due process of law under the Fourteenth Amendment. Pp. 254, 259–261.
2. In requiring that permission of the state supreme court be obtained by petitioner before filing such a petition for writ of error *coram nobis* in a trial court, where the trial court's judgment already has been affirmed by such supreme court, the procedure of the State is in accordance with long-established common law practice and constitutes due process of law under the Fourteenth Amendment. Pp. 254–255, 261.
3. In a trial in a state court of Alabama in which he was represented by competent counsel acceptable to him, did not testify in his own defense and made no claim that his confessions and admissions introduced in evidence were coerced, and in which testimony was introduced as to his previous statement that his confessions and admissions had not been coerced, petitioner was convicted of rape and sentenced to death. On appeal, the Supreme Court of Alabama affirmed. Thereafter, through new counsel, he petitioned the Supreme Court of Alabama for an order granting him the right to file a petition in the trial court for writ of error *coram nobis,* claiming that the confessions and admissions used against him at the trial had been coerced and that, through fear of further reprisals, he had falsely told his own trial counsel the contrary. After argument and upon consideration of the entire record, including that in the trial court and the affidavits filed in support of and in opposition to the petition, but without any statement from petitioner's trial counsel, the Supreme Court of Alabama found that the averments of the petition were unreasonable, that there was no probability of truth contained therein, and that the proposed attack upon the judgment was not meritorious. It accordingly denied the petition. *Held:* In so doing, it did not deny petitioner due process of law under the Fourteenth Amendment. Pp. 261–272.

(a) The issue before this Court is limited to a determination of whether, under all the circumstances, the action of the Supreme Court of Alabama in denying permission for the petitioner to file his petition not merely had committed an error but had deprived the petitioner of life or liberty without due process of law. Pp. 261–262.

(b) In passing upon the petition, the Supreme Court of Alabama was not bound to accept the allegations of the petition at face value. That court was called upon to decide not only whether, if true, it presented a meritorious ground for setting aside its previous judgment but, in its supervisory capacity over the enforcement of the law, to determine also the reasonableness of the allegations made in the petition and the probability or improbability of their truth. P. 262.

(c) The petition and the affidavits filed in its support must be tested for their reasonableness, the probability of their truth, the effectiveness of the attack they make on the original judgment and their relationship to the general enforcement of law with justice to all—in the light of the entire record already made in the case. Pp. 264–265.

(d) In the light of the entire record, the construction given to it by the Supreme Court of Alabama, and that court's finding that the averments of the petition were unreasonable, that there was no probability of truth contained therein and that the proposed attack upon the judgment was not meritorious, and in recognition of that court's supervisory capacity over the procedure in the criminal trials of that State, it cannot be said that the action of the Supreme Court of Alabama in denying the petition was such an arbitrary one as in itself to amount to deprivation of due process of law. Pp. 265–272.

249 Ala. 667, 32 So. 2d 659, affirmed.

After petitioner had been convicted of rape and sentenced to death and his conviction had been affirmed by the Supreme Court of Alabama (249 Ala. 130, 30 So. 2d 256), he petitioned the Supreme Court of Alabama for permission to file a petition for writ of error *coram nobis* in the trial court, claiming for the first time that his confessions and admissions introduced in evidence at the trial had been coerced. The Supreme Court of Alabama de-

nied the petition. 249 Ala. 667, 32 So. 2d 659. This Court granted certiorari. 333 U. S. 866. *Affirmed,* p. 272.

Thurgood Marshall and *Nesbitt Elmore* argued the cause for petitioner. With them on the brief was *Arthur D. Shores.*

Bernard F. Sykes, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief were *A. A. Carmichael,* Attorney General, and *James L. Screws,* Assistant Attorney General.

Mr. Justice Burton delivered the opinion of the Court.

The question in this case is whether the State of Alabama deprived the petitioner of due process of law under the Fourteenth Amendment [1] to the Constitution of the United States when the Supreme Court of that State denied him permission to file a petition for writ of error *coram nobis* in the Circuit Court of Mobile County, Alabama. We hold that it did not. We hold also that the Alabama procedure, whereby one of its trial courts, by writ of error *coram nobis,* may set aside its own judgment in a criminal case because of an error of fact not apparent on the common law record, is a procedure long recognized by the common law and constitutes due process of law under the Fourteenth Amendment. We hold further that the procedure of that State is in accordance with long-established common law practice and constitutes due process of law under the Fourteenth Amendment in requiring that the permission of the Supreme Court of Alabama be secured by a petitioner before filing such a petition for writ of error *coram nobis,* in a trial court of Alabama,

[1] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." U. S. Const. Amend. XIV, § 1.

if it appears that the trial court's judgment already has been affirmed by such Supreme Court.

October 25, 1946, the petitioner, Samuel Taylor, a Negro, residing in Prichard, Mobile County, Alabama, and then 19 years old, was indicted for rape. The act for which he was indicted was an attack made in Prichard, April 12, 1946, on a white girl then 14 years old. October 26, Henri M. Aldridge, of the Mobile County Bar, was appointed by the Circuit Court of that County to represent the petitioner. However, October 28, on counsel's own motion, this order was set aside and, throughout the trial, he represented the petitioner, evidently as counsel of the petitioner's choice or of that of his family. December 30, on motion of the Circuit Court, the same counsel was appointed to prepare and prosecute the petitioner's appeal to the Supreme Court of Alabama. He thus represented the petitioner at least from October 26, 1946, until the date of the judgment of the Supreme Court of Alabama, April 24, 1947, and it is clear that he rendered adequate and competent service.[2]

The trial took place in the Circuit Court of Mobile County, November 19, 1946. After a full hearing in which the petitioner did not take the stand, the trial judge submitted to the jury four alternative forms of verdicts: "guilty of rape as charged in the indictment, and further find he shall suffer death by electrocution"; "guilty of rape, as charged in the indictment, and further find he shall be imprisoned in the penitentiary for —" ("what-

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[2] The Supreme Court of Alabama, in the appellate proceeding, said: "Counsel appointed by the court for the defense has very diligently presented the questions raised in the record, both by oral argument and a full and complete brief." *Taylor* v. *State,* 249 Ala. 130, 133, 30 So. 2d 256, 258. In the present proceeding that court said: "Upon the trial of this cause the petition admits that the defendant was represented by able counsel." *Ex Parte Taylor,* 249 Ala. 667, 669, and see p. 670, 32 So. 2d 659, 660, 661.

ever you should determine, not less than ten years up to life"); "guilty of carnal knowledge, as charged in the indictment, and further find he shall be imprisoned in the penitentiary for — years" ("whatever you should determine, not less than two nor more than ten"), and "not guilty." The jury returned its verdict in the first form and the petitioner was sentenced to be electrocuted January 9, 1947, at the Kilby Prison, at Montgomery, Alabama. No motion was made for a new trial but notice of appeal was entered and the petitioner's sentence was suspended pending the appeal.

On appeal the case was fully briefed and argued, and, April 24, 1947, the judgment was unanimously affirmed. *Taylor* v. *State,* 249 Ala. 130, 30 So. 2d 256. From a subsequent brief of the State it appears that the petitioner did not apply for a rehearing, that he was later denied clemency by the Governor, and that he was granted a reprieve from the execution of the death sentence until September 19, 1947.

September 18, 1947, the petitioner, represented by new counsel, instituted the present proceeding in the Supreme Court of the State at Montgomery. This proceeding is numbered First Division 308 and is entitled *"Ex Parte Taylor, In Re No. 279 Samuel Taylor Appellant* v. *State of Alabama, Appellee."* It was initiated by a petition to the Supreme Court of Alabama for an order granting the petitioner the right to file a petition in the Circuit Court of Mobile County, Alabama, for writ of error *coram nobis.* The petition in this new proceeding was sworn to by the petitioner and supported by the affidavits of three men who had been in the Prichard jail with him June 29–July 3, 1946. This petition and these affidavits executed in September, 1947, presented for the first time a charge that the petitioner's several confessions, his identification of the prosecutrix and the demonstration of locations which had been made by the petitioner as to his part in the crime, all on July 3, 1946, had been

induced by physical violence administered to him or threats made to him in the Prichard jail prior to that date. Throughout the trial uncontradicted testimony had been given repeatedly that the petitioner had volunteered his confessions and that he had made his disclosures "to get it all off his chest." This attitude was reinforced by the petitioner's ready and complete disclosures of many details otherwise unavailable. In each instance these were consistent with the other evidence in the case and were demonstrative of the unfailing truthfulness of the statements made by the petitioner on July 3. Until the filing of this new proceeding, the petitioner's statements had not been at any point self-contradictory or in conflict with other evidence. His present petition, on the other hand, is in direct conflict with the statements made by him to the Mayor of Prichard and others, July 3, and as to which the Mayor testified at the trial, November 19, 1946. The petitioner now alleges that when, apart from the trial, he "was asked by his said attorney who represented him on the trial . . . if he was mistreated or beaten in any fashion by the law enforcement officers in connection with the giving of said confession he replied in the negative, being uneducated and ignorant as aforesaid, and fearful of further reprisals by said police officers." It does not appear that he made any contrary disclosures to his counsel even during the trial of November 19, 1946, or up to the affirmance of the case on appeal, April 24, 1947, although the petitioner had long been out of the custody of the Prichard police and was aware of the diligence with which his counsel, without success, had sought throughout the trial to uncover possible evidence of violence or other coercion in connection with the petitioner's disclosures made on July 3. It is worthy of notice that, prior to the admission in evidence of each statement of the petitioner in the nature of a confession, his counsel diligently sought to inquire into its voluntariness, and never succeeded in

bringing out evidence of its involuntary character. The trial judge in each instance expressly found the evidence to be admissible. The petitioner's failure to change his original statement to his counsel would of course be consistent with its truthfulness and with all the evidence on record before September 18, 1947.

After the filing of the present proceeding the sentence of execution of the petitioner was further suspended. September 25, 1947, the State of Alabama filed its motion to dismiss the new petition. In that motion it called the attention of the court to the testimony in the original proceeding recently reviewed by that court and contradictory to the new position taken by the petitioner. October 29, 1947, the issue was argued and the State filed an affidavit accompanied by eight photographs which had been taken of the petitioner at 5:37 p. m., July 3, 1946. Seven of these were taken of him in the nude immediately after he had made his several confessions on that day and immediately following the dates June 29 to July 2, inclusive, on which dates the new petition alleges that severe beatings had been administered to him.[3] November 13, 1947, the Supreme Court of Alabama, by a vote of six to one, denied the petition. *Ex parte Taylor,* 249 Ala. 667, 32 So. 2d 659. December 4 it denied a rehearing. March 3, 1948, petition for certiorari was filed here. Because of the important relation of this proce-

[3] The State in its brief here says that "it is not unusual for photographs to be taken of defendants in charges of this nature. It is sometimes anticipated by law enforcement officers that a voluntary confession will later be repudiated. Photographs have been taken and introduced in evidence before. *Johnson* v. *State,* 242 Ala. 278 [282], 5 So. 2d 632 [635]." At the original trial no repudiation of the confessions had been made and no testimony had been introduced supporting any charge of coercion of the petitioner by physical violence or otherwise. The photographs were introduced in the case only after affidavits charging coercive physical violence had been filed in the present proceeding.

dure to due process of law under the Fourteenth Amendment, especially in capital cases, we granted certiorari. 333 U. S. 866.

The first question is whether this Alabama procedure to secure a review of a judgment in a criminal case by writ of error *coram nobis* constitutes due process of law under the Fourteenth Amendment. It is clear that it does. This procedure to enable a trial court to correct its own judgment when found by it to have been based upon an error of fact not apparent on the common law record has long been recognized at common law.[4] It survives in varying forms in state practice but it may be that in federal practice its purpose is otherwise served.[5] This

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[4] "If . . . there was error in fact in the proceedings, not error in law, a writ of error *coram nobis* or *coram vobis* might issue to the trial court to enable it to correct the error. . . . If the cause were in the K. B. [King's Bench], the writ would be *coram nobis,* before us, as the record remaining in the court where the king is constructively; if it were in the common pleas, the writ would be *coram vobis,* before you, since the record remains then before the justices of that court." Cooley's Blackstone's Commentaries (4th ed., Andrews, 1899), Book III, p. *406 n. 2.

See also, opinion by Mr. Justice Clifford, on circuit, in *United States* v. *Plumer,* 27 Fed. Cas. 561, 573, No. 16,056.

[5] See *e. g., Hysler* v. *State,* 146 Fla. 593, 1 So. 2d 628, affirmed, 315 U. S. 411; *McCall* v. *State,* 136 Fla. 349, 186 So. 802; *Chambers* v. *State,* 117 Fla. 642, 158 So. 153; *Lamb* v. *State,* 91 Fla. 396, 107 So. 535; and see as to the federal practice, Fed. R. Crim. P., 32, 33, 35 and 36; *Reid* v. *United States,* 149 F. 2d 334 (C. C. A. 5th); *Young* v. *United States,* 138 F. 2d 838 (C. C. A. 5th); *United States* v. *Gardzielewski,* 135 F. 2d 271 (C. C. A. 7th); *Robinson* v. *Johnston,* 118 F. 2d 998 (C. C. A. 9th); *Strang* v. *United States,* 53 F. 2d 820 (C. C. A. 5th); *United States* v. *Plumer,* 27 Fed. Cas. 561, 571–574, No. 16,056. See also, *United States* v. *Smith,* 331 U. S. 469, 475–476, n. 4; *United States* v. *Mayer,* 235 U. S. 55. Cf. *United States* v. *Norstrand Corp.,* 168 F. 2d 481 (C. C. A. 2d), decided May 26, 1948; Moore and Rogers, Federal Relief from Civil Judgments, 55 Yale L. J. 623, 669–674 (1945–1946).

Court has held expressly that, in the form in which the procedure came before us from Florida, in 1942, it conformed to due process of law under the Fourteenth Amendment. *Hysler* v. *Florida,* 315 U. S. 411.[6] The Supreme Court of Alabama, at least since its decision, in 1943, in *Johnson* v. *Williams,* 244 Ala. 391, 13 So. 2d 683, has followed Florida precedents as to this procedure, and there is no controversy here as to the conformity of the present procedure with that of those precedents.[7]

[6] "Such a state procedure of course meets the requirements of the Due Process Clause. Vindication of Constitutional rights under the Due Process Clause does not demand uniformity of procedure by the forty-eight States. Each State is free to devise its own way of securing essential justice in these situations. The Due Process Clause did not stereotype the means for ascertaining the truth of a claim that that which duly appears as the administration of intrinsic justice was such merely in form, that in fact it was a perversion of justice by the law officers of the State. Each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury.

"Florida then had ample machinery for correcting the Constitutional wrong of which Hysler complained. But it remains to consider whether in refusing him relief the Supreme Court of Florida denied a proper appeal to its corrective process for protecting a right guaranteed by the Fourteenth Amendment." *Hysler* v. *Florida,* 315 U. S. 411, 416–417.

See also, *Bute* v. *Illinois,* 333 U. S. 640, 650–654, as to the scope which states enjoy in providing their own procedures within the meaning of due process of law under the Fourteenth Amendment.

[7] See also, *Ex parte Lee,* 248 Ala. 246, 27 So. 2d 147, cert. denied, *sub nom. Lee* v. *Alabama,* 329 U. S. 808; *Ex parte Burns,* 247 Ala. 98, 22 So. 2d 517; *Smith* v. *State,* 245 Ala. 161, 16 So. 2d 315; *Redus* v. *Williams,* 244 Ala. 459, 13 So. 2d 561, cert. denied, 320 U. S. 775; *Brown* v. *State,* 32 Ala. App. 500, 27 So. 2d 226. While, for reasons set forth in the respective opinions, the petition for writ of error *coram nobis* or for permission to file such a petition has been denied

As distinguished from the traditional writ of error enabling a superior court to review an error of law committed by a trial court, the writ of error *coram nobis* brings the error of fact directly before the trial court. However, when the judgment of the trial court already has been affirmed by the judgment of a superior court, then the trial court is bound by the mandate of that superior court. Under those circumstances, it is appropriate to require a petitioner to secure, from that superior court, permission to file his petition for writ of error *coram nobis* in the trial court where he seeks an order setting aside the judgment already affirmed by the superior court. This additional step was included in the Florida procedure which was favorably considered by this Court in *Hysler* v. *Florida, supra.*

It is precisely this step that is before us in the present proceeding. It is the refusal of the Supreme Court of Alabama to grant this permission that is under review. On this point we hold that the Alabama procedure, following both the ancient precedents of the common law and the more recent precedents of Florida and of this Court, does not violate the due process of law required by the Fourteenth Amendment.

We come now to the merits of this particular case. It is charged that the denial by the Supreme Court of Alabama of the permission here sought from it amounted in itself to a denial to this petitioner of the due process of law to which he was entitled under all the circumstances of this case. The petitioner, however, had no mandatory right to the permission. The issue before us is not the issue which would have faced the trial court in the

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in each of the foregoing cases in the Supreme Court of Alabama, nevertheless, the Court of Appeals of Alabama, in the last case cited, in 1946, granted leave for a petitioner to present his petition for writ of error *coram nobis* to the Circuit Court of Russell County.

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event that the Supreme Court of Alabama had granted permission to the petitioner to file his petition for writ of error *coram nobis* in that court. The proceeding here is not even a review, *de novo,* of the merits of the request made to the Supreme Court of Alabama. The issue before us is limited to a determination of whether, under all the circumstances, the action of the Supreme Court of Alabama in denying permission for the petitioner to file his petition not merely had committed error but had deprived the petitioner of life or liberty without due process of law.

In passing upon this request that court was not bound to accept at face value the allegations of the petition. The issue was not submitted to it as though on a demurrer. That court was called upon to decide not only whether this new petition, if true, presented a meritorious ground for setting aside its previous judgment, but that court, in its supervisory capacity over the enforcement of the law, was called upon to determine also the reasonableness of the allegations made in the petition and the probability or improbability of their truth. The standard by which the Supreme Court of Alabama seeks to guide its determination in such a case has been stated by it in *Johnson* v. *Williams,* 244 Ala. 391, 394, 13 So. 2d 683, 686, as follows:

> "We recognize in this State, as does the Supreme Court of Florida (Hysler v. State, 146 Fla. 593, 1 So. 2d 628), that the common law writ of error coram nobis is available . . . and is the appropriate remedy to be followed. See 24 C. J. S., Criminal Law, § 1606. The rule in that State, which we think is just and proper, and is here adopted, calls for a petition to this Court, when the judgment of conviction has been here affirmed, for leave to petition the circuit court where the conviction was obtained for

> a writ of error coram nobis to review such judgment. Such application should make an adequate showing of the substantiality of the petitioner's claim to the satisfaction of this Court. A mere naked allegation that a constitutional right has been invaded will not suffice. The application should make a full disclosure of the specific facts relied upon, and not merely conclusions as to the nature and effect of such facts. The proof must enable this Court to 'ascertain whether under settled principles pertaining to such writ the facts alleged would afford at least prima facie just ground for an application to the lower court for a writ of error coram nobis.' And in the exercise of our discretion in matters of this character, *this Court should look to the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof.* The Supreme Court of the United States in Hysler v. State of Florida, 315 U. S. 411, 62 S. Ct. 688, 691, 86 L. Ed. 932, said that 'each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury', and that the procedure outlined above, which we have adopted from the Florida Court, meets the requirements of the due process clause of the Constitution." (Italics supplied.)

It remains to apply the test to this case. There is a presumption of validity attached to the factual basis for the original judgment which was rendered about 18 months ago after a jury trial. It has been affirmed unanimously by a Supreme Court of seven judges and, in this very proceeding, that court reached a conclusion, by a vote of six to one, that "the averments of the [new]

petition are unreasonable and that there is no probability of truth contained therein, and that the proposed attack upon the judgment is not meritorious." *Ex parte Taylor, supra,* pp. 670–671.

In reviewing that conclusion, we emphasize the following considerations:

Like every capital case, it is one of serious moment. In the state courts and here, consideration must be given to each material issue of fact and law. Both opinions handed down by the Supreme Court of Alabama disclose an appreciation by its members of their constitutional obligations to the petitioner, the State and the nation.

Since the petitioner was sentenced, November 19, 1946, to pay the penalty which the law and the jury have prescribed for the crime of which he was then convicted, the execution of the sentence has been suspended repeatedly in order that the fullest consideration might be given by appropriate authorities to every substantial argument presented on his behalf. The Supreme Court of Alabama has stated its appreciation of its responsibilities in this case as follows:

> "We are fully mindful of petitioner's rights under the due process clause of the Federal Constitution and the responsibility resting upon this court in cases of this character. We not only are mindful of responsibility so far as this defendant is concerned, but also feel like responsibility to society in the enforcement of the criminal laws of our state." *Ex parte Taylor, supra,* p. 669.

If the new petition and its supporting affidavits stood alone or had to be accepted as true, the issue would be materially different from what it is. The Supreme Court of Alabama, however, read this petition and these affidavits, as we must read them, in close connection with the

entire record already made in the case. They must be tested in that context for their reasonableness, the probability of their truth, the effectiveness of the attack they make on the original judgment and their relationship to the general enforcement of law with justice to all.

The new petition and the affidavits have inherent elements of strength and weakness bearing upon their credibility to which the Supreme Court of Alabama was entitled to give consideration. In contrast to the situation presented in many other cases where a petition for writ of error *coram nobis* has been relied upon, this petition contains no charge that there was any false testimony presented at the trial (except for its reference to testimony by Sergeant Wilkes which reference the record shows is plainly erroneous). The petitioner bases his claims upon evidence not presented at the original trial. This consists of evidence of coercion alleged to have been applied to the petitioner by police officers at times not covered by the testimony given at the original trial. All of this additional evidence, if true, must have been known to the petitioner at the time of his trial but it is claimed that he concealed it even from his own counsel. It is newly disclosed evidence, rather than newly discovered evidence, and its credibility in the eyes of the Supreme Court of Alabama may well have been affected by that fact. The new petition does not deny the guilt of the petitioner or deny any of the acts upon which his conviction was based. It claims merely that the coercion applied to the petitioner was such that it would be a sufficient basis for the exclusion, from a new trial, of the evidence of certain confessions and subsequent conduct of the petitioner that was used against him at the original trial.

The petition contains no charges that the state's attorney made use of any false testimony or that he knew of any of the coercion relied upon in the new petition.

More serious than this lack of compelling force to the petitioner's attack are the following circumstances which were appropriate for consideration by the Supreme Court of Alabama in passing upon the probable truth or falsity of those allegations:

1. The only affidavits presented are those of the petitioner himself and of three persons, each of whom was an associate of the petitioner, arrested and detained with him by the Prichard police, June 29–July 3, 1946, under a charge of some crime not connected with the rape. One of these affiants is serving a ten-year sentence in the Kilby Prison for robbery. With the exception of one instance on June 29, none of the three associates claims to have seen the alleged beatings of the petitioner, although each claims to have heard the beatings being administered. The charges as to the alleged beatings are made in such extreme terms that marks of such beatings, if they actually occurred, probably would have been evident on July 3, whereas the testimony at the trial as to the physical condition of the petitioner on that day is to the contrary and the appearance of the petitioner in the photographs, taken on July 3, was found by the Supreme Court of Alabama to lend no support to these statements in the affidavits.

2. The petition charges Sergeant C. D. Wilkes of the Prichard police force with perjuring himself "by falsely testifying that Petitioner was not subjected to any mistreatment in connection with making said confession." Sergeant Wilkes, however, gave no testimony on that subject. At the trial he testified only as to his being on duty when the petitioner was arrested on June 29, as to the identification made of the petitioner by the prosecutrix, as to the fact that he talked with the petitioner at 9 p. m. on July 2, and as to the manner in which the petitioner had volunteered to make his confession at

3 a. m. on July 3. Nothing was said by Sergeant Wilkes on direct or cross-examination or was even asked of him on cross-examination as to any mistreatment of the petitioner or as to any subject as to which there appears to be any conflict of fact. The record of the trial demonstrates on its face that the charge of perjury is without foundation.

3. In the trial record there is no evidence, either on direct or cross-examination of any witness, of any physical or mental coercion, or of any inducement or promise bearing upon the volunteered, detailed and repeated confessions by the petitioner of his conduct, the identification of his victim or his designation, by sketch and on the premises, of the localities of material occurrences. Although the alert and diligent counsel for the petitioner endeavored at the trial to test on each occasion the voluntariness of every statement in the nature of a confession that was made by the petitioner, he did not succeed in convincing the court that any of them should be excluded as having been involuntarily made. His efforts resulted in nothing more than establishing that many witnesses had little or no knowledge as to the presence or absence of coercion during extended periods prior to the petitioner's confessions, although they testified to the voluntariness of the confessions at the time they were made and for varying periods prior thereto. The Supreme Court of Alabama said: "The question of the voluntary character of the confession was duly considered and treated in the opinion on former appeal. Nor did the record contain the slightest indication that the defendant, a Negro twenty years of age, was ignorant and in any manner subnormal." *Ex parte Taylor, supra,* p. 669.

4. No witness testified at the trial to having seen any evidence of physical violence on the body of the petitioner. G. M. Porter, the member of the Prichard police who was

on duty much of the time at the jail and who brought the petitioner from his cell in answer to petitioner's request on July 3 for an opportunity to make his initial confession, expressly testified on cross-examination that at that time there were no signs of the petitioner having been mistreated. The photographs taken that afternoon are described in the opinion of the Supreme Court of Alabama as disclosing "no indications on the body of any physical violence as set forth in the petition." *Ex parte Taylor, supra,* p. 669.

5. Still more striking are the statements made by the petitioner himself on July 3. These were made under circumstances so disarming and self-confirmatory as to suggest the reasonableness of their credibility by the jury and later by the Supreme Court on its review of the record. When read in full, the statements of the petitioner throughout July 3 are so free in manner, detailed in content and affirmative in their nature that they carry obvious earmarks of being the truth. The record shows that at 3 a. m. on July 3 the petitioner called from his cell that he wished to tell "all of it" and "get it all off his chest." Shortly thereafter, he told his story before the Mayor of Prichard and others. He repeated it to still others who came in later. He volunteered further details while riding in a car to the scene of the crime. His statements in the car were then and there written down by an assistant county solicitor, were signed by the petitioner and were supplemented by a sketch which the petitioner drew himself. These signed statements and this sketch were introduced in evidence on cross-examination of the assistant county solicitor who had been called as a witness on behalf of the petitioner. Later that day, the petitioner made a further detailed statement in question and answer form. He personally identified the victim of his crime in the presence of several witnesses and she identified him.

In his testimony given in the presence of the Mayor, the petitioner stated unequivocally that he had not been beaten or coerced. Excerpts from this testimony are set forth in the margin as retold by the Mayor at the trial.[8]

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[8] Glen V. Dismukes, Mayor of Prichard, on cross-examination by counsel for the petitioner, testified as to the appearance and conduct of the petitioner immediately preceding his initial confession at about 3 a. m. July 3, as follows:

"Q. And you do not know whether, or not, they actually inflicted any violence on him before you got there?

"A. He didn't appeared [appear] to be frightened in any way.

"Q. But you don't know. He didn't appear to be frightened?

"A. No.

"Q. Did he seem to be wholly at ease?

"A. Perfectly at ease.

"Q. I see. You came in there at three o'clock in the morning, and found this negro boy and two policemen, and he seemed to be perfectly at ease?

"A. Yes, sir.

"Q. Didn't seem to be upset at all?

"A. Not at all.

"Q. Didn't appear to be nervous?

"A. No.

"Q. Perfectly friendly?

"A. Rather pleasant.

"Q. Rather pleasant, well, and you don't know whether, or not, after you talked to him that they made any promises or threats, do you, Mr. Dismukes?

"A. No, sir."

Later that day the Mayor visited the scene of the crime with the petitioner and others and, after their return to the office of the Chief of Police, the petitioner made replies to questions asked of him by the State Solicitor. These questions and answers were recalled by the Mayor in his oral testimony and were thus introduced at the trial. Some of this testimony of the Mayor in response to direct examination by the State Solicitor was as follows:

"Q. Now, Mr. Dismukes, on that time and place there in the office to which we referred, do you recall me asking him [the petitioner], 'When were you arrested on this charge, Samuel?', and him answering,

6. The petition alleges that the petitioner falsely told his own attorney that he had not been beaten and that he so told his attorney because of fear of further reprisals. This attorney was the one who had been appointed by the court to defend the petitioner and later privately retained for the petitioner. Still later he was appointed by the court to handle the case on appeal. There is nothing other than this petition to suggest that the petitioner at any time misled his attorney, or lacked confidence in him, or had reason to lack confidence in him. Both the record and the attorney's conduct of the trial and appeal are thoroughly consistent with the petitioner's having told his attorney that he had not been beaten and there is nothing, other than the new petition, to show that such statement was false. The trial took place on November 19, 1946, and in that connection petitioner was detained

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'I was arrested Saturday night around midnight.' Do you recall that?

"A. Yes, sir.

"Q. Then do you recall me asking, 'And you have been in jail since that time?' and he answering, 'Yes, sir.'

"A. Yes, sir.

"Q. Do you recall me saying, 'Now, since you have been in jail, Samuel, have you been properly treated?' Do you recall him answering, 'Yes, sir.'

"A. Yes, sir.

"Q. Do you recall me asking him, 'Have any of the officers mistreated you, or threatened to beat you, or offered you any reward, to get you to talk?' And his answer being, 'No, sir.'

"A. That is right.

"Q. Do you recall me asking him, 'Have any of them beat you or kicked you?' And he answering, 'No, sir.'

"A. That's right.

"Q. Do you recall me asking him, 'Now, a few minutes ago when Dr. Grubbs took pictures of you naked, were there any marks on your body that were put there by the police?' And him answering, 'No, sir.'

"A. Yes, sir."

in the Mobile County jail rather than with the Prichard police. After his conviction the petitioner was sent to Kilby Prison in Montgomery, over 200 miles away.

The Supreme Court of Alabama concluded:

> "The trial was conducted with much care. There is nothing in the record on former appeal to indicate the slightest appeal to prejudice, nor was a single untoward incident recorded. We think it is asking entirely too much of the court to believe that this defendant, in the secrecy of consultation with his own able counsel, would say to counsel in substance that there was nothing upon which to base an objection to his confessions, solely because he was under fear generated by treatment which he claims was accorded him on July 3, nearly four months previous." *Ex parte Taylor, supra,* p. 670.

The petitioner's trial attorney has submitted no affidavit and has not appeared in the present proceeding.

For these reasons, we conclude not only that the Alabama procedure is in accordance with due process of law under the Fourteenth Amendment, but that the denial by the Supreme Court of Alabama of the permission thus sought by the petitioner to file a petition for writ of error *coram nobis* in the Circuit Court of Mobile County, Alabama, was not, under all the circumstances, such an arbitrary action as in itself to amount to a deprivation of due process of law.

The Supreme Court of Alabama was acting within its constitutional authority when, in its supervisory capacity over the procedure in the criminal trials of that State, it denied to petitioner the right to file this petition for writ of error *coram nobis* and stated that "Upon due consideration we conclude that the averments of the petition are unreasonable and that there is no probability

of truth contained therein, and that the proposed attack upon the judgment is not meritorious." *Ex parte Taylor, supra,* pp. 670–671.

Accordingly, the judgment of the Supreme Court of Alabama is

Affirmed.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

The dissenting opinion is written as though this Court were a court of criminal appeals for revision of convictions in the State courts. It is written as though we were asked to consider independently, and as a revisory appellate tribunal which had power to do so, whether a conviction in the courts of Alabama was based upon a coerced confession. One would hardly gather from the dissenting opinion that a trial was had in Alabama under the best safeguards to which a defendant in our courts is entitled; that he was defended by counsel concededly able who exerted all his professional skill on behalf of his client; that the trial judge guided the proceedings with competence and scrupulosity; that then followed a careful review of the trial on appeal, resulting in an affirmance of the judgment of conviction by the highest court of Alabama.

The Due Process Clause of the Fourteenth Amendment does require still further protection. A State must furnish corrective process to enable a convicted person, even after such proceedings as I have outlined, to establish that in fact a sentence was procured under circumstances which offend "the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney* v. *Holohan,* 294 U. S. 103, 112. Such re-insurance that no one is punished in violation of basic notions of justice does not of course require determination of such

a claim by another jury. "Each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury." *Hysler* v. *Florida,* 315 U. S. 411, 417.

Alabama, it cannot be denied, provides for such corrective process. If Alabama chose to leave the determination of the reasonableness of such a claim as is here made finally and on the merits to the Supreme Court of Alabama, of course we could not say that Alabama was disregardful of the requirements of due process. Nor, in view of the circumstances of this case, could we in all fairness say that the Supreme Court of Alabama could not have reasonably rejected that claim—made as belatedly as it was and having regard to the human probabilities of the situation. If the Supreme Court of Alabama could, as a matter of due process, have rejected on the merits the claim that the very foundation of the original proceedings, resulting in the judgment of conviction, was undermined because of an infraction of the United States Constitution, it would disregard reason for this Court to hold that a conscientious State court could not have concluded, as the Supreme Court of Alabama has concluded, that, on the totality of the circumstances, the probabilities were so strong against the truth of the allegations on which the claim was based that it did not require a hearing of witnesses to reject it. In reaching such a conclusion the Supreme Court of Alabama was entitled to consider the circumstances of the original trial, the manner of its conduct by the trial judge, the professional ability with which the defendant was represented, the behavior of the accused throughout the proceedings, and, in the light of all these circumstances, the weight to be attached to the affidavits on which his present petition is based.

For me, the essence of the decision of the Alabama Supreme Court is contained in the following sentence: "We think it is asking entirely too much of the court to believe that this defendant, in the secrecy of consultation with his own able counsel, would say to counsel in substance that there was nothing upon which to base an objection to his confessions, solely because he was under fear generated by treatment which he claims was accorded him on July 3, nearly four months previous." 249 Ala. 667, 670. Since I cannot deem the reasoning by which this conclusion was reached as unsustainable in reason, I am not entitled to reject it, and I therefore agree with this Court's opinion.

But this merely carries me to sustaining the judgment of the Alabama Supreme Court. There is not now before us any right that the petitioner may have under the Judicial Code to bring an independent *habeas corpus* proceeding in the District Court of the United States.[1]

MR. JUSTICE MURPHY, dissenting.

One of the fixed principles of due process, as guaranteed by the Fourteenth Amendment, is that no conviction in

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[1] See also § 2254 of the legislation revising the Judicial Code, H. R. 3214, 80th Cong., 2d Sess., as passed by Congress on June 16, 1948:

"State custody: remedies in State courts.

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." (Congressional Record, June 16, 1948, p. 8676.)

a state court is valid which is based in whole or in part upon an involuntary confession. *Lee* v. *Mississippi,* 332 U. S. 742, 745. Wherever a confession is shown to be the product of mental or physical coercion rather than reasoned and voluntary choice, the conviction is void. And it is void even though the confession is in fact true and even though there is adequate evidence otherwise to sustain the conviction.

This principle reflects the common abhorrence of compelling any man, innocent or guilty, to give testimony against himself in a criminal proceeding. It is a principle which was written into the Constitution because of the belief that to torture and coerce an individual into confessing a crime, even though that individual be guilty, is to endanger the rights and liberties of all persons accused of crime. History has shown that once tyrannical methods of law enforcement are permitted as to one man such methods are invariably used as to others. Brutality knows no distinction between the innocent and the guilty. And those who suffer most from these inquisitorial processes are the friendless, the ignorant, the poor and the despised. *Chambers* v. *Florida,* 309 U. S. 227, 237–238. To guard against this evil, therefore, the Constitution requires that a conviction be set aside whenever it appears that a confession introduced at the trial is involuntary in nature.

The problem in this case is whether the petitioner, having been found guilty of rape and sentenced to death, is now entitled to a hearing on his allegation that the confession introduced at the trial was obtained by coercive methods. The Supreme Court of Alabama refused to allow a hearing on the theory that the allegation was unreasonable. In affirming that refusal, however, this Court relies upon considerations which are either irrelevant, inconclusive or contrary to the constitutional principle just discussed:

(1) The Court emphasizes that the petition does not deny the guilt of petitioner or deny any of the acts upon which his conviction was based. But whether petitioner be innocent or guilty has no bearing whatever on the reasonableness of the allegation that the confession was coerced. Even if we assume that petitioner is guilty beyond all doubt, the due process clause still invalidates his conviction if it was obtained through use of a coerced confession. The thrust of that clause is directed toward the voluntariness of the confession, not toward the innocence of the accused.

(2) Significance is given to the fact that the statements made by petitioner and introduced at the trial as his confession "are so free in manner, detailed in content and affirmative in their nature that they carry obvious earmarks of being the truth." Here again the Court misconceives the nature and purpose of the constitutional principle in issue. Coerced confessions are outlawed by the due process clause regardless of the truth or falsity of their content. It is just as uncivilized to brutalize an accused person into telling the truth as it is to force him to fabricate a confession. The torture and coercion are what the Constitution condemns. Hence an allegation that a confession is involuntary is not rendered unreasonable because of the apparent truthfulness of that confession.

(3) The Court refers to the absence of any evidence at the original trial of any physical or mental coercion or of any inducement or promise bearing upon the confession made by petitioner. But because he allegedly was still suffering from the coercive effects of the beatings, petitioner made no effort at the trial to prove that he had been subject to undue pressure prior to 3 a. m., July 3, 1946, which is the crucial period. Most of the witnesses at the trial admitted ignorance as to the events occurring before that time. Thus the proof at the trial

is at least consistent with the allegation now made and is not such as to render the allegation unreasonable.

(4) Objection is made that the only affidavits supporting the allegation are those of petitioner himself and of three persons associated with him. I fail to see, however, how such an objection indicates the unreasonableness of the allegation. The affidavits are those of four Negroes arrested on the street at the same time and detained on a robbery charge. Their common arrest and detention do not necessarily render untrustworthy any affidavits on the part of petitioner's three companions. A statement by a friend or associate can be just as probative for present purposes as a statement by an enemy or a disinterested person. It is not our function now to weigh the effect which the relationships of the four affiants may have on the verity of their statements. Sufficient it is that the statements are reasonable and pertinent on their face. Moreover, the jail sentence now being served by one of the companions does not, standing alone, destroy the force of his affidavit unless we are to indulge in the unrealistic assumption that nothing said by a prison inmate is to be given credence. Overlooked in this respect is the fact that two of the companions are now free individuals who presumably lack what the Court feels is the taint of imprisonment. I can only conclude, therefore, that if there is anything wrong with these affidavits it does not appear in the background of the affiants.

(5) The Court observes that, except for one instance, none of the three associates claims to have seen the alleged beatings of the petitioner; all they did was to hear the brutality being inflicted. But I had never supposed that an allegation of coercion was any less reasonable because the alleged torture did not take place before the very eyes of disinterested witnesses. A moment's reflection will demonstrate that coercion is most likely to occur in

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secret and to be witnessed, if at all, through the ears of other inmates. Whether there is any truth to the claimed overhearing, of course, is a matter for the trier of facts and does not affect the reasonableness of the claim itself.

(6) The alleged beatings are said to be so extreme in nature as to be evident on July 3, when photographs of the petitioner were taken. Suffice it to say that photographs can be most deceiving, especially photographs of a person like petitioner. The Supreme Court of Alabama realized this fact and placed no particular reliance upon the photographs; the dissenting judge, however, was convinced that the pictures did show numerous marks on petitioner's body. Under these circumstances, we should refrain from judging the reasonableness of the allegation by what we think appears in deceptive photographs.

(7) The statement that Sergeant Wilkes perjured himself at the trial apparently has no foundation, as the Court points out. But this factor has no particular relevance to the reasonableness of the claim of coercion. Such an error should not prejudice petitioner's entire allegation.

(8) It is said that there is nothing other than the petition to show that petitioner concealed the alleged coercion from his attorney at the trial. This fact may be conceded, but it hardly warrants treating the claim as unreasonable. The coercion conceivably could have been so effective as to shut petitioner's lips all through the trial and to silence him even as to his own attorney. We should not close the door to proof of that possibility.

Thus I find inadequate the considerations relied upon by this Court to affirm the judgment below. Petitioner has made an allegation of the most serious nature, one that reflects gravely upon the law enforcement processes of Alabama. He claims that for four nights preceding the confession he was "brutally beaten, kicked and bruised in an effort to obtain said confession" and put in "great fear for his future safety." Cf. *Chambers* v. *Florida*,

supra. Three other persons are willing to testify that they heard blows struck and heard petitioner "scream and holler many times." A perusal of the record reveals an absence of any factor that would render this allegation completely sleeveless. Doubts may reasonably exist as to the merits of the allegation. But they are doubts which should be resolved at a full hearing. That is all that petitioner now asks. And I believe that a denial of his request to have the opportunity to prove his allegation is a denial of due process of a most flagrant nature.

We are dealing here with a matter of life and death, a matter of constitutional importance. If it were our function to speculate upon the effect petitioner's confession had on the jury's verdict, it would seem clear that the confession was of crucial importance. There was little else to sustain the verdict, the prosecutrix's identification of petitioner being somewhat weakened by the fact that she had previously made a positive and mistaken identification of another Negro. And the confession undoubtedly affected the jury's choice from among four alternative forms of the guilty verdict of the one that imposed the death sentence. Cf. *Andres* v. *United States,* 333 U. S. 740. If the confession was in fact coerced, therefore, the conviction itself was thoroughly impregnated with the coercion. But the degree of such impregnation is irrelevant under the due process clause. As we have seen, it is enough if a coerced confession was actually introduced at the trial. The conviction then becomes void under well established rules. Where there is a reasonable possibility that a conviction is void for this reason, I think that an opportunity should be afforded a condemned man to demonstrate his case. Petitioner's execution is no answer to the allegation which he has raised.

Fortunately, this Court has not yet made a final and conclusive answer to petitioner's claim. All that has been

decided here is that the Supreme Court of Alabama did not err in declining to permit him to file a petition for writ of error *coram nobis* in the Alabama courts. Nothing has been held which prejudices petitioner's right to proceed by way of *habeas corpus* in a federal district court, now that he has exhausted his state remedies. He may yet obtain the hearing which Alabama has denied him.

MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join this dissent.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1948.

MacDOUGALL ET AL. *v.* GREEN, GOVERNOR OF ILLINOIS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 348. Argued October 18, 1948.—Decided October 21, 1948.

The Illinois Election Code, Ill. Rev. Stat., c. 46, § 10—2, requires that a petition to form, and to nominate candidates for, a new political party be signed by at least 25,000 qualified voters, including at least 200 from each of at least 50 of the 102 counties in the State. Alleging that 52% of the State's registered voters reside in Cook County alone, 87% in the 49 most populous counties, and only 13% in the 53 least populous counties, appellants sued to enjoin enforcement of the requirement of at least 200 signatures from each of at least 50 counties. *Held:* This requirement does not violate the due-process, equal-protection or privileges-and-immunities clause of the Fourteenth Amendment, Art. I, § 2 or § 4, Art. II, § 1, or the Seventeenth Amendment of the Constitution of the United States. Pp. 282–284.

80 F. Supp. 725, affirmed.

In a suit to enjoin enforcement of Ill. Rev. Stat., c. 46, § 10—2, the District Court found want of jurisdiction and denied the injunction. 80 F. Supp. 725. On appeal to this Court, *affirmed,* p. 284.

John J. Abt and *Richard F. Watt* argued the cause for appellants. With them on the brief were *Earl B. Dickerson* and *Edmund Hatfield.*

William C. Wines, Assistant Attorney General of Illinois, argued the cause for Green, Governor, et al., appellees. With him on the brief were *George F. Barrett,* Attorney General, and *Raymond S. Sarnow,* Assistant Attorney General.

Melvin F. Wingersky argued the cause for Flynn, County Clerk, et al., appellees. With him on the brief was *Gordon B. Nash.*

PER CURIAM.

This action was brought before a three-judge court convened in the Northern District of Illinois under 28 U. S. C. § 2281 and § 2284. The object of the action is an injunction against the enforcement of a provision which, in 1935, was added to a statute of Illinois and which requires that a petition to form and to nominate candidates for a new political party be signed by at least 25,000 qualified voters, "Provided, that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties within the State." Ill. Rev. Stat. c. 46, § 10—2 (1947). Appellants are the "Progressive Party," its nominees for United States Senator, Presidential Electors, and State offices, and several Illinois voters. Appellees are the Governor, the Auditor of Public Accounts, and the Secretary of State of Illinois, members of the Boards of Election Commissioners of various cities, and the County Clerks of various counties. The District Court found want of jurisdiction and denied the injunction. 80 F. Supp. 725. Appellants invoke the jurisdiction of this Court under 28 U. S. C. § 1253.

The action arises from the finding of the State Officers Electoral Board that appellants had not obtained the requisite number of signatures from the requisite number

of counties and its consequent ruling that their nominating petition was "not sufficient in law to entitle the said candidates' names to appear on the ballot." The appellants' claim to equitable relief against this ruling is based upon the peculiar distribution of population among Illinois' 102 counties. They allege that 52% of the State's registered voters are residents of Cook County alone, 87% are residents of the 49 most populous counties, and only 13% reside in the 53 least populous counties. Under these circumstances, they say, the Illinois statute is so discriminatory in its application as to amount to a violation of the due-process, equal-protection, and privileges-and-immunities clauses of the Fourteenth Amendment, as well as Article I, §§ 2 and 4, Article II, § 1, and the Seventeenth Amendment of the Constitution of the United States.

It is clear that the requirement of two hundred signatures from at least fifty counties gives to the voters of the less populous counties of Illinois the power completely to block the nomination of candidates whose support is confined to geographically limited areas. But the State is entitled to deem this power not disproportionate: of 25,000 signatures required, only 9,800, or 39%, need be distributed; the remaining 61% may be obtained from a single county. And Cook County, the largest, contains not more than 52% of the State's voters. It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality. This is not a unique policy. See New York Laws 1896, c. 909, § 57, now N. Y. Elec. Law § 137 (4); 113 Laws of Ohio 349, Gen. Code § 4785–91 (1929), now Ohio Code Ann. (Cum. Supp. 1947) § 4785–91; Mass. Acts, 1943, c. 334, § 2, now Mass. Ann. Laws c. 53, § 6 (1945). To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the

smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States. *Colegrove* v. *Green,* 328 U. S. 549, and *Colegrove* v. *Barrett,* 330 U. S. 804.

On the record before us, we need not pass upon purely local questions, also urged by appellants, having no federal constitutional aspect.

Judgment affirmed.

MR. JUSTICE RUTLEDGE.

In its facts and legal issues this case is closely analogous to *Colegrove* v. *Green,* 328 U. S. 549. It presents serious constitutional questions crucial to the validity of Illinois election procedures and their application to the imminently impending general election. That a bare majority of this Court resolve them one way and three others hold opposing views only emphasizes their substantial character and supreme importance. These qualities are not diminished by the fact that the Attorney General of Illinois, appearing for the three members of the so-called "State Certifying Board," [1] has conceded in his brief the

[1] The State Certifying Board is composed of the Governor, the Auditor of Public Accounts and the Secretary of State, and petitions for the formation of new state-wide political parties are filed with this board. (Ill. Rev. Stat. c. 46 [1947] §§ 10—2, 10—4.) On the filing of timely objection to such petitions, the certifying board

validity of appellants' position and at the bar of this Court has confessed error in the decision of the District Court. Nor is it insignificant or irrelevant that the application of the statutory procedures made by the state officials in practical effect denies to a substantial body of qualified voters the right to exercise their suffrage in behalf of candidates of their choice.

Forced by the exigencies of their situation, appellants have invoked federal equity jurisdiction in vindication of their rights. They seek injunctive relief, in effect, to compel placing the names of their candidates upon the ballot for the general election to be held on November 2. For present purposes we may assume that appellants have acted with all possible dispatch. Even so, we find ourselves confronted on the eve of the election with the alternatives of denying the relief sought or of directing the issuance of an injunction.

This choice, in my opinion, presents the crucial question and the only one necessarily or properly now to be decided. Beyond the constitutional questions it poses delicate problems concerning the propriety of granting the relief in the prevailing circumstances. Even if we assume that appellants' constitutional rights have been violated, the questions arise whether, in those circumstances, the equity arm of the federal courts can now be extended to

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transmits the petitions and the objections to the State Officers Electoral Board, which is not a party to this action. After passing on the objection, the State Officers Electoral Board informs the State Certifying Board of its ruling, and the certifying board is required to "abide by and comply with the ruling so made to all intents and purposes." (Ill. Rev. Stat. c. 46 [1947] § 10—10.) Where objection is not made, or where it is made and overruled, the new party and the names of its candidates are certified by the State Certifying Board to the several county clerks; the clerks or the local boards of election commissioners, both groups being parties to this action, thereupon are required to print ballots containing the names of the candidates thus certified. (Ill. Rev. Stat. c. 46 [1947] § 10—14.)

give effective relief; and whether the relief, if given, might not do more harm than good, might not indeed either disrupt the Illinois election altogether or disfranchise more persons than have been disfranchised by the application of the questioned Illinois procedures.

Every reason existing in *Colegrove* v. *Green, supra,* which seemed to me compelling to require this Court to decline to exercise its equity jurisdiction and to decide the constitutional questions is present here. See the opinion concurring in the result, 328 U. S. at 564. Indeed the circumstances are more exigent and therefore more compelling to that conclusion.

We are on the eve of the national election. But twelve days remain. Necessarily some of these would be consumed in remanding the cause to the District Court and in its consideration, formulation and issuance of an injunction in essentially specific terms. The ballots, as certified by the state officials, are in process of printing and distribution. Absentee ballots have been distributed. Illinois is one of the more populous states. Millions of ballots will be required, not only in the state but in Cook County alone. It is true that, on the short record before us and in the necessarily brief time available for preparing both the record and the briefs, appellees who oppose granting the relief have not made an absolutely conclusive factual showing that new ballots, containing the names of appellants' candidates, could not possibly be printed and distributed for use at the election. But they suggest with good reason that this could not be done. The task would be gigantic. Even with the mobilization of every possible resource, it is gravely doubtful that it could be accomplished. The risk would be very large that it could not be done. Even if it could for all except absentee voters, they would be disfranchised. Issuance of the injunction sought would invalidate the ballots

already prepared, including the absentee ballots, and those now in course of preparation.

The sum of these considerations, without regard to others not now necessary to state, forces me to conclude that the relief sought could be had at this late stage in the electoral process only at the gravest risk of disrupting that process completely in Illinois or of disfranchising Illinois voters in perhaps much greater numbers than those whose interests appellants represent. That is a risk which, in my judgment, federal courts of equity should not undertake and indeed are not free to undertake within the historic limits of their equity jurisdiction.

Accordingly, I express no opinion concerning the constitutional and other questions presented. As in *Colegrove* v. *Green, supra,* I think the case is one in which, for the reasons stated, this Court may properly, and should, decline to exercise its jurisdiction in equity. Accordingly, but solely for this reason, I agree that the judgment refusing injunctive relief should be affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting.

I think that the 1935 amendment of the Illinois Election Code, Ill. Rev. Stat. c. 46, § 10–2 (1947), as construed and applied in this case, violates the Equal Protection Clause of the Fourteenth Amendment.

That statute requires the nominating petition of a new political party, which places candidates on the ballot for the general election, to contain 200 signatures from each of at least 50 of the 102 counties in the state. The statute does not attempt to make the required signatures proportionate to the population of each county. One effect of this requirement is that the electorate in 49 of the counties which contain 87% of the registered voters could not form a new political party and place its candidates on

the ballot. Twenty-five thousand of the remaining 13% of registered voters, however, properly distributed among the 53 remaining counties could form a new party to elect candidates to office. That regulation thus discriminates against the residents of the populous counties of the state in favor of rural sections. It therefore lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

Free and honest elections are the very foundation of our republican form of government. We are dealing here with important political rights of the people—the voting for electors provided by Article II, § 1, of the Constitution; the right of the people to elect senators, guaranteed by the Seventeenth Amendment; the right of the people to choose their representatives in Congress, guaranteed by Article I, § 2, of the Constitution. Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity. The protection which the Constitution gives voting rights covers not only the general election but also extends to every integral part of the electoral process, including primaries. *United States* v. *Classic,* 313 U. S. 299; *Smith* v. *Allwright,* 321 U. S. 649. When candidates are chosen for the general election by a nominating petition, that procedure also becomes an integral part of the electoral process. It is entitled to the same protection as that which the Fourteenth Amendment grants any other part.

None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. See *Nixon* v. *Herndon,* 273 U. S. 536. The dilution of political rights may be as complete and effective if the same discrimination appears in the procedure prescribed for nominating petitions. See *State* v. *Junkin,* 85 Neb. 1, 122 N. W. 473.

It would, of course, be palpably discriminatory in violation of the Equal Protection Clause if this law were aimed at the Progressive Party in the manner that the state law in *Nixon* v. *Herndon, supra,* was aimed at negroes. But the effect of a state law may bring it under the condemnation of the Equal Protection Clause however innocent its purpose. It is invalid if discrimination is apparent in its operation. The test is whether it has some foundation in experience, practicality, or necessity. See *Skinner* v. *Oklahoma,* 316 U. S. 535, 541–542.

It is not enough to say that this law can stand that test because it is designed to require statewide support for the launching of a new political party rather than support from a few localities. There is no attempt here, as I have said, to make the required signatures even approximately proportionate to the distribution of voters among the various counties of the state. No such proportionate allocation could of course be mathematically exact. Nor would it be required. But when, as here, the law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, it offers no basis whatever to justify giving greater weight to the individual votes of one group of citizens than to those of another group. This legislation therefore has the same inherent infirmity as that which some of us saw in *Colegrove* v. *Green,* 328 U. S. 549, 569. The fact that the Constitution itself sanctions inequalities in some phases of our political system [1] does not justify us in allowing a state to create

[1] The Federalist No. 62 explained the equality of representation of the States in the Senate as follows:

"If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government, and that among independent and sovereign States, bound together by a simple league, the parties, however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason that in a compound

additional ones. The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.

Federal courts should be most hesitant to use the injunction in state elections. See *Wilson* v. *North Carolina,* 169 U. S. 586, 596. If federal courts undertook the role of superintendence, disruption of the whole electoral process might result, and the elective system that is vital to our government might be paralyzed. Cf. *Johnson* v. *Stevenson,* 170 F. 2d 108. The equity court, moreover, must always be alert in the exercise of its discretion to make sure that its decree will not be a futile and ineffective thing. But the case, as made before us, does not indicate that either of those considerations should deter us in striking down this unconstitutional statute and in freeing the impending Illinois election of its impediments. The state officials who are responsible for the election and who at this bar confessed error in the decision of the

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republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation.

. . . . .

"the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.

"Another advantage accruing from this ingredient in the constitution of the Senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States."

District Court make no such intimation or suggestion. We are therefore not authorized to assume that our decree would interfere with the orderly process of the election.

MANDEL BROTHERS, INC. *v.* WALLACE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 16. Argued October 14, 1948.—Decided November 8, 1948.

1. Certain claims of Wallace and Hand Patent No. 2,236,387, for an improved cosmetic preparation to retard or inhibit perspiration, *held* invalid for want of invention. Pp. 291–296.
2. Since the use of urea as an anticorrosive agent in other compounds was already a matter of public knowledge, its use in antiperspirants to reduce the likelihood of skin irritation or garment corrosion was merely the application of an old process to a new use and was not invention. Pp. 293–296.

164 F. 2d 861, reversed.

In a patent infringement suit, the District Court held the claims invalid for want of invention and dismissed the complaint. 67 F. Supp. 814. The Court of Appeals reversed. 164 F. 2d 861. This Court granted certiorari. 333 U. S. 853. *Reversed,* p. 296.

Leonard S. Lyon argued the cause for petitioner. With him on the brief was *Thomas A. Sheridan.*

Charles J. Merriam argued the cause for respondent. With him on the brief was *Bernard A. Schroeder.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The respondent, owner of Wallace and Hand patent No. 2,236,387, filed a complaint against this petitioner for

infringement of claims 1 to 6, 8 to 13, 15 and 16. The District Court held the claims invalid for want of patentable invention and dismissed the complaint. 67 F. Supp. 814. The United States Court of Appeals for the Seventh Circuit held the claims valid and reversed. 164 F. 2d 861. The United States Court of Appeals for the Second Circuit had previously affirmed a district court's invalidation of the same patent. *Wallace* v. *F. W. Woolworth Co.*, 45 F. Supp. 465; 133 F. 2d 763. To resolve the conflict we granted certiorari.

The patent is for an "improved" cosmetic preparation to retard or inhibit perspiration. Prior to application for the patent (1938), many antiperspirants were on the market containing acid salts of a metal, usually aluminum chloride or aluminum sulfate. The acidity produced by these acid-reacting salts is an astringent which retards perspiration. But, as stated in the patent specifications, the acid sometimes irritates the skin and also rots clothing to which the acid may adhere, particularly when that clothing is heated by ironing. Thus in the old antiperspirants the astringent qualities of the acid were desirable because essential to their effectiveness in retarding perspiration; on the other hand, the skin irritating and cloth corroding qualities of the acid were obviously undesirable. This was the problem as posed by the patent application.

The patent specifications asserted and the District Court found that though standard alkalies would neutralize and thus reduce acidity and consequent skin irritation and cloth corrosion, these alkalies would by neutralizing acidity also reduce the astringency essential to check perspiration. The claimed discovery of the patent is in adding to the old acid-salts cosmetics certain types of the reactive amino chemical group, particularly urea. This addition, the patentees asserted, results in an im-

proved compound which checks perspiration but neither irritates the skin nor corrodes the clothing.

The District Court found that the addition of urea to the older preparations greatly reduced whatever likelihood there had been that application of the preparation would irritate skin [1] or corrode garments. It found that the patentees were the first persons to use urea as a corrosion inhibiting agent in an antiperspirant. But the District Court also found that prior to the patentees' alleged discovery the use of urea as an anticorrosive agent was already a matter of public knowledge, and that it had previously been used as a corrosion inhibitor in compounds other than antiperspirants. As a consequence of these findings, the District Court held the patent invalid. The District Court and the United States Court of Appeals in the case of *Wallace* v. *F. W. Woolworth Co., supra,* had held the patent invalid for the same reason.

Long prior to this patent, it was generally recognized in the chemical field that urea would react with acids, bases, and salts to produce new substances. Urea had been in general use wherever these results were desirable for chemical stabilizations. And respondent concedes that before application was made for this patent it was commonly known, at least by chemists, that urea would react with acids in a manner which would reduce their corrosiveness. These facts are made clear by this record, by the opinions of the four courts that considered

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[1] Petitioner points out that the District Court in the *Woolworth* case found the evidence before it inadequate to show that the old preparations had resulted in substantial skin irritation and urges a like inadequacy of evidence here. But the District Court here found that "the astringent materials may attack the skin of sensitive individuals" and that "a residue of acid remained which sometimes irritated the skin."

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this patent, and by their discussions of the prior patents relied on by the respondent here.

Prior patents (Schüpphaus, No. 514,838, and Koch No. 2,011,292) had suggested use of urea as a stabilizer against decomposition of chemical combinations into deleterious acidic substances. It may be assumed that these patents standing alone would not have taught these patentees to experiment with urea to solve their cosmetic problem. They do, however, show the state of the prior art and point to the possibility of using urea to inhibit unwanted decomposition of substances containing acid or acid salts. Indeed, Koch dealt with the addition of urea to aluminum salts. And Missbach, in No. 2,069,711, proposed to protect clothes from the deleterious effects of dry cleaning fluids by the use of urea to prevent injury due to acidic substances brought about by acidic reactions of carbon tetrachloride. He claimed his invention provided "an effective corrosion inhibitor."

Shipp patent No. 2,174,534 pointed out that "certain uses of sulfuric acids on textiles are so advantageous that endeavors have been made to so treat textiles with sulfuric acid as to obtain the desired effects but to avoid the undesirable effects." The undesirable result Shipp wanted to eliminate was the "marked degrading or disintegrating effect on cellulose fibers" of "strong sulfuric acid." He therefore proposed use of an agent "capable of inhibiting or at least greatly retarding the normal degrading action of strong sulfuric acid upon cellulose." The "inhibiting" agent there proposed was urea or other materials such as "an amide alone or an amide and an amine . . . ." The corrosion "inhibiting" agents here are amino groups which include urea.

Respondent contends that the Shipp patent is irrelevant. He urges that the Shipp preparation merely retards corrosion on cloth whereas respondent's stops cor-

rosion completely. He also points out that Shipp dealt with sulfuric acid and not an acid salt as is involved in this patent. He argues that the teachings of the Shipp and other patents would not have led a chemist skilled in his art to undertake the experiment which eventuated in the success of these patentees. He takes this position because in the use of alkalies and even of urea with plain acids, the acids did not retain their full effectiveness as antiperspirants. The natural conclusion of a chemist, he argues, would have been that urea would result in the same failure if combined with the acid salts involved in his patent. But it did not. Urea combined with acid salts brought about the desired result. This result he therefore contends was a "paradoxical" one, unpredictable by a skilled chemist. Consequently, he says, the discovery rose to the level of patentable invention.

But we think that the state of the prior art was plainly sufficient to demonstrate to any skilled chemist searching for an anticorrosive agent that he should make the simple experiment that was made here. The patentees knew that urea was in general use as a stabilizing agent with acid and salts. Moreover, the patentees knew that standard alkalies had been successfully employed in prior patents for their anticorrosive effect. It is not surprising therefore that after experimenting with various standard alkalies in an effort to find a corrosion inhibitor that would not greatly reduce acidic astringency, the patentees promptly turned to urea. Their success was immediate.

As the United States Court of Appeals for the Second Circuit pointed out when this patent was before it: ". . . skillful experiments in a laboratory, in cases where the principles of the investigations are well known, and the achievement of the desired end requires routine work rather than imagination, do not involve invention." These established principles of law would dispose of the

case except for the position taken by the United States Court of Appeals in this case that the cosmetic problem here was remote and unrelated to the problems considered in the prior art. For this reason that court held that patentees in the field of cosmetics were not bound by prior art knowledge disclosed by the Shipp and other patents. The court therefore considered this patent almost as though patentees were writing on a clean sheet. Accordingly it held that the use of urea in the cosmetics field with the results here obtained was patentable invention.

In this the court was in error. As we have pointed out, the general store of chemical knowledge in 1938 was such that anyone working on any problem of acidic corrosion and irritation would naturally and spontaneously have tried urea. All that these patentees did was to utilize in a cosmetic preparation, publicly available knowledge that urea would inhibit acidic corrosion. The step taken by the patentees in advance of past knowledge was too short to amount to invention. They merely applied an old process of inhibition to a new cosmetic use. This is not invention. *Dow Chemical Co.* v. *Halliburton Oil Well Cementing Co.*, 324 U. S. 320, 327.

Reversed.

Mr. Justice Douglas would reverse the judgment on the authority of *Funk Bros. Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127, 131, which was decided after the decision of the Court of Appeals in this case.

HOINESS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 20. Argued October 21, 1948.—Decided November 8, 1948.

1. A District Court entered an order dismissing a libel and directing that counsel for respondents submit findings of fact and conclusions of law. Subsequently, it filed findings of fact and conclusions of law and a decree dismissing the libel. Libelant appealed within three months from the date of the first order and what he sought to have reviewed was plain; but he referred only to the second order in his petition for appeal. The Court of Appeals dismissed the appeal on the ground that the first order was the final one and that the second order was not appealable. *Held:* It erred in doing so, since the defect resulting from a failure to refer to the first order was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in R. S. § 954, 28 U. S. C. (1946 ed.) § 777. Pp. 300–301.
2. A seaman on a vessel owned by the United States and operated under an agreement between the War Shipping Administration and a private shipping company was injured while the vessel was docked at San Francisco and brought a libel *in personam* against the United States under the Suits in Admiralty Act. The libel did not allege that the seaman was a resident of the district where suit was brought nor that the vessel was found there at the time suit was filed. The United States did not appear specially but answered to the merits. Raising the question *sua sponte*, the District Court dismissed the libel for want of jurisdiction. *Held:* It erred in doing so, since the provisions of § 2 of the Suits in Admiralty Act directing where suits shall be brought relate not to jurisdiction but to venue, which was waived by failure to object before pleading to the merits. Pp. 301–302.

165 F. 2d 504, reversed.

A District Court dismissed for want of jurisdiction a libel brought by a seaman against the United States and others under the Suits in Admiralty Act. 75 F. Supp. 289. The Court of Appeals dismissed an appeal. 165 F. 2d 504.

This Court granted certiorari. 333 U. S. 859. *Reversed,* p. 302.

Herbert Resner argued the cause and filed a brief for petitioner.

Harry I. Rand argued the cause for the United States, stating that the Government was not opposed to the reversal of the judgments below and a remand of the cause to the District Court for a decision on the merits. With *Mr. Rand* on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, John R. Benney* and *Alvin O. West.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was a seaman on the *S. S. Escanaba Victory,* a vessel owned by the United States and operated under an agreement between the War Shipping Administration [1] and the American-South African Line, Inc., the provisions of which are unnecessary to relate here. He was injured while the vessel was docked at the port of San Francisco, California, and brought this suit in admiralty against the United States [2] under the Suits in Admiralty Act.[3]

[1] The United States Maritime Commission now stands in its shoes. See 60 Stat. 501.

[2] Other parties were also sued but they were dismissed from the case.

[3] Section 2 of that Act provides in part:

"That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for

41 Stat. 525, 46 U. S. C. § 742. The libel alleged that the United States maintains offices and principal places of business in the Northern District of California where the suit was brought, but it did not allege that petitioner was a resident of that district [4] nor that the vessel was found there at the time suit was filed. The United States did not appear specially but answered to the merits, leaving all questions of jurisdiction to the court. The District Court raised the question of jurisdiction *sua sponte* and, being of opinion that jurisdiction was lacking, dismissed the libel. 75 F. Supp. 289.

Its opinion was dated August 5, 1946, and on the same day it entered an order reading as follows:

> "It is ordered:
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> "That the libel herein is dismissed for lack of jurisdiction, and that respondents have judgment for costs.
>
> "Counsel for respondents will submit findings of fact and conclusions of law in accordance with the rules of court and the opinion filed herewith."

On October 14, 1946, it filed "Findings of Fact and Conclusions of Law" and a decree. The decree after formal recitals stated:

> "Wherefore, by reason of the law and the evidence and the premises, and the findings of fact and conclusions of law, as aforesaid, it is ordered, adjudged and decreed that the above-entitled Court has no jurisdiction over the subject matter of the action, and that the libel be dismissed."

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the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . . Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States."

[4] The record shows the petitioner's residence was in Oregon.

On October 18, 1946, petitioner filed a petition for appeal stating that he was "aggrieved by the rulings, findings, judgment and decree made and entered herein on October 14, 1946." The appeal was allowed on the same day.

The Court of Appeals by a divided vote dismissed the appeal, holding that the first order was the final one and that the decree of October 14, 1946, was not appealable. 165 F. 2d 504. The case is here on certiorari.

I. We find it unnecessary to determine whether the order of August 5 or that of October 14, 1946, was the final decision [5] from which an appeal could be taken within the meaning of § 128 of the Judicial Code, 36 Stat. 1133, 28 U. S. C. (1946 ed.) § 225; 62 Stat. 929, 28 U. S. C. § 1291. The appeal was taken within three months of the earlier of the two and was therefore timely. 43 Stat. 940, 28 U. S. C. (1946 ed.) § 230. And although the petition for appeal referred solely to the second order and not to the first, that defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in R. S. § 954, 28 U. S. C. (1946 ed.) § 777.[6]

The mandate of that statute is for a court to disregard niceties of form and to give judgment as the right of the

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[5] This is the kind of problem which could be appropriately handled through the rule making authority of the Court of Appeals. Cf. *Commissioner* v. *Bedford*, 325 U. S. 283, 288.

[6] That section reads as follows:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the

cause shall appear to it. It seems to us hypertechnical to say that the appeal papers did not bring the sole issue of the case fairly before the Court of Appeals. Thus the assignments of error framed in the appeal attacked the basis of the first order as well as the second. What appellant sought to have reviewed was plain. The failure to use the words August 5, 1946, if that be taken as the date of the final decision, was as insubstantial as a misspelling of the words would have been, since the words used identified the rulings which were challenged, and in no way altered the scope of review. Cf. *R. F. C.* v. *Prudence Group,* 311 U. S. 579, 582; *Georgia Lumber Co.* v. *Compania,* 323 U. S. 334, 336.

II. The ruling of the District Court that the provisions of § 2 of the Suits in Admiralty Act, directing where suits shall be brought,[7] were jurisdictional was in our view erroneous. Those provisions properly construed relate to venue.

The section relates not to libels *in rem* but to libels *in personam.* A similar provision in § 5 of the Tucker Act (24 Stat. 506, 28 U. S. C. (1946 ed.) § 762, 28 U. S. C. § 1402), was held to prescribe venue and hence could be and was waived by failure to object before pleading to

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party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

After the dismissal of the appeal in this case, the foregoing section was repealed, effective September 1, 1948. 62 Stat. 992, § 39. And see Revision of Title 28, U. S. Code, H. Rep. No. 308, 80th Cong., 1st Sess., p. A 239. But the policy expressed in § 954 was preserved as respects cases pending at the time of the repeal, since the repealing statute provides that "Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal." And see Rules 1, 15, 61, and 81, Rules of Civil Procedure.

[7] See note 3, *supra.*

the merits. *United States* v. *Hvoslef,* 237 U. S. 1, 11–12; *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19, 24. An analogous provision in the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, was construed the same way. *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 384–385. And we recently indicated that that was the correct construction of comparable provisions of § 2 of the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. § 782 (*Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, 224), an act which is similiar in purpose and design to the present one. See *American Stevedores* v. *Porello,* 330 U. S. 446, 452–453.

Congress, by describing the district where the suit was to be brought, was not investing the federal courts "with a general jurisdiction expressed in terms applicable alike to all of them." See *Panama R. Co.* v. *Johnson, supra,* p. 384. It was dealing with the convenience of the parties in suing or being sued at the designated places. The purpose of the Act was to grant seamen relief against the United States in its own courts. The concepts of residence and principal place of business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land and, unlike private parties, is not centered at one particular place. The residence or principal place of business of the libelant and the place where the vessel or cargo is found may be the best measure of the convenience of the parties. But if the United States is willing to defend in a different place, we find nothing in the Act to prevent it.

The judgment is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

Syllabus.

FORD MOTOR CO. *v.* UNITED STATES.

NO. 1. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA.*

Argued October 11, 1948.—Decided November 15, 1948.

1. In a civil antitrust suit by the United States against Ford and a finance company, a 1938 consent decree prohibited affiliation by Ford with any finance company, but provided that the prohibition would cease if, by January 1, 1941, General Motors was not similarly prohibited by court order. In 1940, the Government brought an equity suit against General Motors seeking divestiture of its affiliated finance company. After successive extensions of the prohibition against Ford, the Government moved, on December 31, 1945, to extend the prohibition to January 1, 1947. The suit against General Motors has not yet been set for trial. Ford and the finance company moved that the prohibition be lifted. The District Court granted the Government's motion and denied defendants' motion. *Held:*

   (a) Although the extension to January 1, 1947, has expired, the question whether the District Court properly granted it is not moot, since the Government's motion for a further extension has been held in abeyance pending the outcome of these appeals. P. 313.

   (b) Ford was entitled to the lifting of the prohibition against affiliation with any finance company, and the District Court's extension of the prohibition to January 1, 1947, was improper. *Chrysler Corp.* v. *United States*, 316 U. S. 556, distinguished. Pp. 320–322.

2. The consent decree also restrained various practices whereby dealers were influenced to patronize the finance company, but provided that Ford could move for modification or suspension if similar restrictions were not imposed on General Motors by court action. It also provided that a general verdict of guilty in a pending antitrust criminal proceeding against General Motors would be deemed a determination of the illegality of any agreement, act or practice "which is held by the trial court, in its instructions to the jury,

*Together with No. 2, *Commercial Investment Trust Corp. et al.* v. *United States*, also on appeal from the same Court.

to constitute a proper basis for the return of a general verdict of guilty." In 1939, the jury returned a general verdict of guilty against General Motors upon instructions that coercion of dealers to utilize an affiliated finance company was illegal but that mere persuasion was not. Ford and the finance company moved to suspend or modify provisions of the decree forbidding Ford to recommend, endorse, or advertise the finance company, to have agents of Ford and of the finance company present together with a dealer for the purpose of influencing the dealer to patronize the finance company, and to discriminate against other finance companies. *Held:* Upon the basis of the trial court's instructions to the jury in the criminal proceeding against General Motors, the motion should have been granted. Pp. 313–320.

3. In the present posture of the case, the Government's claim that the practices restrained by the provisions of the decree are illegal under the Sherman Law, which has neither been admitted nor proven, does not justify the refusal of a court of equity to suspend or modify them. P. 320.

(a) Appellants are entitled to insist that, so long as interdiction of these practices has not been decreed against General Motors, the Government be put to its proof. P. 320.

(b) Lifting of the restraints imposed by the consent decree would not affect the liability of Ford for any violations of the Sherman Law that the Government may establish in court. P. 320.

(c) To the extent that such restraints may in future be imposed on General Motors, they would, by the terms of the consent decree, also bind Ford. P. 320.

68 F. Supp. 825, reversed.

In an antitrust suit by the United States against the Ford Motor Company and a finance company, the Government moved in the District Court for a further extension of a provision of a consent decree prohibiting Ford from affiliating with any finance company. Ford and the finance company moved for a lifting of the prohibition and for suspension or modification of other provisions of the decree. The District Court granted the Government's motion and denied the others. 68 F. Supp. 825. Upon appeals to this Court, *reversed,* p. 322.

Charles E. Hughes, Jr. argued the cause and was on a brief for appellants. *William T. Gossett, Clifford B. Longley, Frederick C. Nash* and *Wallace R. Middleton* were also on the briefs for appellant in No. 1, and *Samuel S. Isseks, Melbourne Bergerman, Seymour Kleinman* and *Alphonse A. Laporte* were also on the briefs for appellants in No. 2.

Albert Holmes Baldridge argued the cause for the United States. With him on the brief were *George T. Washington,* then Acting Solicitor General, *Assistant Attorney General Berge* and *James C. Wilson.*

Russell Hardy filed a brief for the Associates Investment Co. et al., as *amici curiae,* urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These cases were brought here on appeal, prior to the revision of Title 28, United States Code, under what was § 345 and since September 1 has become § 2101 of that Title, to review final decrees of the United States District Court for the Northern District of Indiana in a suit in equity brought by the United States under § 4 of the Sherman Law, 26 Stat. 209, as amended, 36 Stat. 1167, 15 U. S. C. § 4. The cases present another phase of a multifarious litigation which has been occupying the attention of the federal judicial system for more than a decade. *United States* v. *General Motors Corp.,* 26 F. Supp. 353 (N. D. Ind.); *United States* v. *General Motors Corp.,* 121 F. 2d 376 (C. A. 7th Cir.), cert. denied, 314 U. S. 618, rehearing denied, 314 U. S. 710; *United States* v. *General Motors Corp.,* 2 F. R. D. 346 (N. D. Ill.); *United States* v. *General Motors Corp.,* 2 F. R. D. 528 (N. D. Ill.); *Chrysler Corp.* v. *United States,* 314 U. S. 583,

rehearing denied, 314 U. S. 716; *Chrysler Corp.* v. *United States,* 316 U. S. 556. An analytical summary of this litigation will make clear the immediate issues before us and, indeed, largely dispose of them.

On May 27, 1938, indictments were returned in the District Court of the United States for the Northern District of Indiana, South Bend Division, against the three leading automobile manufacturers and the companies which financed the sale of their automobiles. One indictment was against the present appellants, Ford Motor Company, and Commercial Investment Trust Corporation, Commercial Investment Trust, Inc., and Universal Credit Corporation, these three referred to collectively as CIT; another against Chrysler Corporation and Commercial Credit Company; a third against General Motors Corporation and its subsidiary, General Motors Acceptance Corporation, to be abbreviated as GMAC. The indictments charged the automobile manufacturers and the jointly named finance companies with violations of the Sherman Law by influencing dealers who sold the automobiles of the respective manufacturers to give the finance companies the business of financing the dealers' wholesale purchases and retail sales of automobiles.

Following these charges, negotiations were set afoot to secure the elimination through consent decrees of the practices described in the indictments. As to the Ford and Chrysler groups, the Government, on November 7, 1938, filed suits in equity and arranged for the dismissal of their indictments. (For present purposes we are not further concerned with Chrysler.) Although Ford and CIT formally resisted the complaint, denying its allegations and pleading affirmative defenses, negotiations for a consent decree proceeded. Efforts toward an amicable settlement with General Motors and GMAC failed. The Government therefore pressed the criminal charges against them. In view of the competitive conditions in

the automobile industry it obviously became of crucial importance to Ford not to consent to any restraints beyond those which would fall upon General Motors through the contingencies of litigation against it. But it would not have been enough merely to provide that restraints which Ford accepted should eventually be lifted to the extent not imposed upon General Motors at some remote time defined merely by the vicissitudes of litigation. Protection against competitive disadvantage, the appropriateness of which the Government recognized, required a time certain at the end of which the restraints against Ford would expire if General Motors were still free of them.

Accordingly, the consent decree, entered on November 15, 1938, assured Ford essential equality of position with the unconsenting General Motors by two explicit conditions. Their terms are fully set out in the margin; [1]

[1] "12. The Respondent Finance Company shall not pay to any automobile manufacturing company and the Manufacturer shall not obtain from any finance company any money or other thing of value as a bonus or commission on account of retail time sales paper acquired by the finance company from dealers of the Manufacturer. The Manufacturer shall not make any loan to or purchase the securities of Respondent Finance Company or any other finance company, and if it shall pay any money to Respondent Finance Company or any other finance company with the purpose or effect of inducing or enabling such finance company to offer to the dealers of the Manufacturer a lower finance charge than it would offer in the absence of such payment, it shall offer in writing to make, and if such offer is accepted it shall make, payment upon substantially similar bases, terms and conditions to every other finance company offering such lower finance charge; provided, however, that nothing in this paragraph contained shall be construed to prohibit the Manufacturer from acquiring notes, bonds, commercial paper, or other evidence of indebtedness of Respondent Finance Company or any other finance company in the open market.

"It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and

their essence can be briefly summarized. Paragraph 12 forbids Ford from acquiring control of any finance company. After enumerating various forbidden forms of financial interest, the paragraph provides that, if the Gov-

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of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The court, upon application of the respondents or any of them, will enter an order or decree to that effect at the foot of this decree, and the right of any respondent herein to make the application and to obtain such order or decree is expressly conceded and granted.

"12a. It is a further express condition of this decree that:

"(1) If the proceeding now pending in this court against General Motors Corporation instituted by the filing of an indictment by the Grand Jury on May 27, 1938, No. 1039, or any further proceeding initiated by reindictment of General Motors Corporation for the same alleged acts, is finally terminated in any manner or with any result except by a judgment of conviction against General Motors Corporation and General Motors Acceptance Corporation therein, then and in that event every provision of this decree except those contained in this sub-paragraph (1) of this paragraph 12a of this decree, shall forthwith become inoperative and be suspended, until such time as restraints and requirements in terms substantially identical with those imposed herein shall be imposed upon General Motors Corporation and General Motors Acceptance Corporation and their subsidiaries either (a) by consent decree, or (b) by final decree of a court of competent jurisdiction not subject to further review, or (c) by decree of such court which although subject to further review continues effective. The court reserves jurisdiction upon application of any party to enter orders at the foot of this decree in accordance with the provisions of this paragraph.

"(2) A general verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment

ernment should not have obtained a final decree against General Motors by January 1, 1941, requiring it to divest itself of all interest in GMAC, its affiliated finance company, the prohibition against Ford would cease. The

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thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice of General Motors Corporation which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty. A special verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to constitute a determination of the illegality of any agreement, act or practice of General Motors Corporation which is the subject of such special verdict of guilty. A plea of guilty or nolo contendere by General Motors Corporation, followed by the entry of judgment of conviction thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice which is the subject matter of such plea. The determination, in the manner provided in this clause, of the illegality of any agreement, act or practice of General Motors Corporation shall (for the purposes of clause (3) of this paragraph) be considered as the equivalent of a decree restraining the performance by General Motors Corporation of such agreement, act or practice, unless or until such judgment is reversed, or unless such determination is based, in whole or in part, (a) upon the ownership by General Motors Corporation of General Motors Acceptance Corporation, or (b) upon the performance by General Motors Corporation of such agreement, act or practice in combination with some other agreement, act or practice with which the respondents are not charged in the indictment heretofore filed against them by the Grand Jury on May 27, 1938, No. 1041;

"(3) After the entry of a consent decree against General Motors Corporation, or after the entry of a litigated decree, not subject to further review, against General Motors Corporation by a court of the United States of competent jurisdiction, or after the entry of a judgment of conviction against General Motors Corporation in the proceeding hereinbefore referred to, or after January 1, 1940 (whichever date is earliest), the court upon application of any respondent from time to time will enter orders:

"(i) suspending each of the restraints and requirements contained in sub-paragraphs (d) to (f) and (h) to (l), inclusive, of paragraph 6 of this decree to the extent that it is not then imposed, and until

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second express condition, designed to relieve from restraints imposed by earlier paragraphs in the decree against various means of influencing dealers to patronize CIT, is found in paragraph 12a. That paragraph addressed itself to the possible eventualities of the criminal proceeding against General Motors and GMAC: (1) its termination with a result other than a judgment of conviction; (2) a general verdict of guilty; (3) a special verdict of guilty; (4) a plea of guilty or nolo contendere. Upon the first contingency all restrictive terms of the de-

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it shall be imposed, in substantially identical terms, upon General Motors Corporation and its subsidiaries, and suspending each of the restraints and requirements contained in sub-paragraphs (a), (c) and (d) of paragraph 7 of this decree to the extent that it is not imposed and until it shall be imposed in substantially identical terms, upon General Motors Acceptance Corporation and its subsidiaries, either (w) by consent decree, or (x) by final decree of a court of competent jurisdiction not subject to further review, or (y) by decree of such court which, although subject to further review, continues effective, or (z) by the equivalent of such a decree as defined in clause (2) of this paragraph; provided, however, that if the provisions of a consent or litigated decree against General Motors Corporation and its subsidiaries corresponding to sub-paragraphs (j) and (k) of paragraph 6 of this decree are different from said sub-paragraphs of this decree, then upon application of the respondents any provision or provisions of said sub-paragraphs will be modified so as to conform to the corresponding provisions of such General Motors Corporation decree;

"(ii) suspending each of the restraints and requirements contained in the remaining sub-paragraphs (a), (b), (c) and (g) of paragraph 6 to the extent that it is not then imposed, and until it shall be imposed, upon General Motors Corporation and its subsidiaries in any manner specified in the foregoing sub-clause (i) of clause (3), if any respondent shall show to the satisfaction of the court that General Motors Corporation or its subsidiaries is performing any agreement, act or practice prohibited to the Manufacturer by said remaining sub-paragraphs, and suspending each of the restraints and requirements contained in sub-paragraph (b) of paragraph 7 of this decree to the extent that it is not imposed, and until it shall be imposed, upon General Motors Acceptance Corporation and its sub-

cree against Ford would be suspended until similar restraints were imposed upon General Motors and GMAC. The second was to be "deemed to be a determination of the illegality of any agreement, act or practice of General Motors Corporation which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty." The third and fourth were, respectively, to be deemed determinations of the illegality of "any agreement, act or practice" which was their subject matter.

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sidiaries in any said manner, if any respondent shall show to the satisfaction of the court that General Motors Acceptance Corporation is performing any agreement, act or practice prohibited to Respondent Finance Company by said sub-paragraph (b) of paragraph 7;

"(iii) Suspending the restraints of sub-paragraph (d) of paragraph 7 of this decree as to Respondent Finance Company, in the event that the restraints of sub-paragraph (i) of paragraph 6 of this decree are suspended as to the Manufacturer.

"(4) The right of the respondents or any of them to make any application for suspension of any provision of this decree in accordance with the provisions of this paragraph and to obtain such relief is hereby expressly granted.

"In the event that at any time prior to the date when General Motors Corporation has permanently divested itself of all ownership and control of and interest in General Motors Acceptance Corporation, General Motors Acceptance Corporation shall make available to dealers of General Motors Corporation in any area a finance charge, on all or any class of automobiles sold by dealers of General Motors Corporation, less than the finance charge then generally available to dealers of the Manufacturer within such area, nothing in this decree shall prevent the Manufacturer from making, and the Manufacturer may make, adjustments, allowances or payments to or with all of its dealers in such area who agree to reduce to an amount approved by the Manufacturer (but not less than that then made available by General Motors Acceptance Corporation) the finance charges which such dealers of the Manufacturer in such area receive from any class of retail purchasers of automobiles, provided that such adjustments, allowances or payments shall not discriminate among such dealers in such area."

These provisions furnish a litmus-paper test for determining what restraints survive the result of the proceeding against General Motors and GMAC. What was not illegal for General Motors was not longer to be prohibited to Ford. The sword of justice was to strike both alike. Paragraph 12a further defines how and when the restraints were to be relaxed. Sub-paragraph (3) provides that after the entry of a decree against General Motors, or after the entry of a judgment of conviction in the pending criminal proceedings "or after January 1, 1940 (whichever date is earliest), the court upon application of any respondent from time to time will enter orders" suspending any restraint against it (with exceptions not now relevant) "to the extent that it is not then imposed, and until it shall be imposed, in substantially identical terms" upon General Motors or GMAC.

On November 17, 1939, the jury returned a general verdict of guilty against General Motors, the Court of Appeals for the Seventh Circuit affirmed the judgment upon that verdict, 121 F. 2d 376, and this Court denied further review. 314 U. S. 618; *id.* at 710.

On October 4, 1940, the Government finally brought a suit in equity against General Motors seeking divestiture of its control of GMAC. But it was then too late for a decree to be entered before the lapse of Ford's agreement not to become affiliated with a finance company. On December 21, 1940, therefore, the Government made a motion asking to have paragraph 12 modified by moving forward the date when the prohibition against affiliation would expire if a decree against General Motors had not then been entered. Each year after that, as the new deadline came near, the Government made a new motion to have it extended, and year after year Ford consented to the extension. On December 31, 1945, the Government again moved to have the prohibition against

affiliation extended, this time to January 1, 1947. Ford now resisted the motion, and on May 4, 1946, both Ford and CIT filed motions of their own. They asked the District Court to suspend sub-paragraphs (i) and (k) of paragraph 6 and sub-paragraph (d) of paragraph 7 and to modify sub-paragraph (e) of paragraph 6 on the ground that the practices enjoined by these provisions of the decree were not "held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty." Ford also moved that "an order be entered pursuant to paragraph 12 . . . that nothing therein shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company . . . ." The District Court denied the motions by Ford and CIT and granted the Government's motion for extension of the prohibition against affiliation to January 1, 1947. The present appeals followed. Although the particular extension of paragraph 12 appealed from has expired, the equity suit against General Motors has not yet been set down for trial and the Government's motion for a further extension has been held in abeyance pending the outcome of these appeals. It is not a moot question therefore whether the District Court properly granted the extension to January 1, 1947. See *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, 514–16.

The restraints imposed against Ford by sub-paragraphs 6 (e), 6 (i), 6 (k) and 7 (d) must survive the outcome of the conviction against General Motors if the language of the trial judge's charge to the jury in the criminal prosecution of General Motors can fairly be equated with the language of those sub-paragraphs. If, on the other hand, the judge's charge falls short of holding illegal what those

sub-paragraphs proscribed, appellants are entitled to a suspension of sub-paragraphs 6 (i), 6 (k) and 6 (d) and a modification of sub-paragraph 6 (e).

First, then, to summarize the contents of these provisions of the decree.[2] Sub-paragraph 6 (i) precludes

[2] Their full text is as follows:

"[6.] (e) Except as provided by sub-paragraphs (j) and (k) of this paragraph 6,

"(i) the Manufacturer shall not establish any practice, procedure or plan for the retail or wholesale financing of automobiles for the purpose of enabling Respondent Finance Company or any other finance company or companies to enjoy a competitive advantage in obtaining the patronage of dealers through any service, facility or privilege extended by the Manufacturer pursuant to such practice, procedure or plan if such service, facility or privilege or a service, facility or privilege corresponding thereto, is not made available upon its written request to any other finance company upon substantially similar terms and conditions; and

"(ii) so long as the Manufacturer shall continue to afford any service, facility or privilege not otherwise specifically referred to in this decree to Respondent Finance Company or any other finance company or companies, it shall not refuse to afford similar or corresponding services, facilities or privileges upon substantially similar terms and conditions and upon written request to any other finance company for the purpose of giving Respondent Finance Company or any other finance company or companies a competitive advantage in obtaining the patronage of dealers; provided that it shall not be a violation of this decree for the Manufacturer to afford such service, facility or privilege only to registered finance companies as defined in sub-paragraph (j) of this paragraph 6 or only to a finance company designated in writing to the Manufacturer by the dealer or prospective dealer;

"the written request shall specify in each instance the particular service, facility or privilege desired;

. . . . .

"[6.] (i) The Manufacturer shall not, except in each instance upon written request of the dealer or prospective dealer, arrange or agree with Respondent Finance Company or any other finance company that an agent of the Manufacturer and an agent of the finance company shall together be present with any dealer or prospective dealer

Ford from arranging with CIT or any other finance company "that an agent of the Manufacturer and an agent of the finance company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer to patronize" the finance company. Sub-para-

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for the purpose of influencing the dealer to patronize Respondent Finance Company or such other finance company; provided, however, that it shall not be a violation of this decree for the Manufacturer to assist any dealer or prospective dealer, because of said dealer's or prospective dealer's financial situation or requirements, by joint conference with him and a representative of a particular finance company, to obtain special facilities or services (such term not including only the financing of the shipment or delivery of automobiles to such dealer or prospective dealer and/or only the purchase or acquisition of retail time sales paper from him in the regular course of business) from the particular finance company and, in part consideration of such special facilities or services, for such dealer or prospective dealer to arrange to do business with such finance company on an exclusive basis for a reasonable period of time as may be agreed between them;

. . . . .

"[6.] (k) The Manufacturer shall not recommend, endorse or advertise the Respondent Finance Company or any other finance company or companies to any dealer or to the public; provided, however, that nothing in this decree contained shall prevent the Manufacturer in good faith:

"(1) From adopting from time to time a plan or plans of financing retail sales of new automobiles made by the Manufacturer or from time to time withdrawing or modifying the same;

"(2) From recommending to its dealers the use of such plans;

"(3) From advertising to the public and recommending the use of such plans.

. . . . .

"7. The Respondent Finance Company:

. . . . .

"(d) Shall not, except upon written request of the dealer or prospective dealer, arrange or agree with the Manufacturer that an agent of the Manufacturer and an agent of Respondent Finance Company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer or prospective dealer

graph 6 (k) provides that "the Manufacturer shall not recommend, endorse or advertise the Respondent Finance Company or any other finance company or companies to any dealer or to the public . . . ." Sub-paragraph 7 (d), the counterpart of 6 (i), is directed against CIT. Sub-paragraph 6 (e) restrains Ford from establishing "any practice, procedure or plan for the retail or wholesale financing of automobiles for the purpose of enabling Respondent Finance Company or any other finance company or companies to enjoy a competitive advantage in obtaining the patronage of dealers" not equally available to any other finance company. Modification of this sub-paragraph is asked only to the extent necessary to permit them freedom to act in a manner otherwise permissible, if suspension of sub-paragraphs 6 (i), 6 (k) and 7 (d) is granted.

This brings us to the trial judge's instructions, which, insofar as relevant, are fully set forth below.[3] Their plain effect is to draw a line between such practices as cancellation of a dealer's contract, or refusal to renew it,

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to patronize Respondent Finance Company; provided, however, that it shall not be a violation of this decree for Respondent Finance Company by joint conference with a dealer or prospective dealer and a representative of the Manufacturer to agree to furnish to such dealer or prospective dealer, because of his financial situation or requirements, special facilities or services (such term not including only the financing of the shipment or delivery of automobiles to such dealer or prospective dealer and/or only the purchase or acquisition of retail time sales paper from him in the regular course of business) and in part consideration of such special facilities or services to arrange for the dealer or prospective dealer to do business with Respondent Finance Company on an exclusive basis for such reasonable period of time as may be agreed between them."

[3] "It is not unreasonable for the General Motors Company to have a finance company. It is not unreasonable for the General Motors Company to have contracts with its dealers for a year or to have a cancellation clause in them. They have a perfect right to have a finance company and to recommend its use. They have

or discrimination in the shipment of automobiles, as a means of influencing dealers to use GMAC, all of which fall within the common understanding of "coercion," and other practices for which "persuasion," "exposition" or "argument" are fair characterizations. As a mere matter of interpreting language, the Government hardly challenges the fitness of the terms "persuasion," "ex-

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a perfect right to cancel a contract from their dealer as long as they are not performing any unreasonable act.

"They have a right to determine whom they will sell their cars to, and they have a right to determine whom they will not sell their cars to because cars are their product and they are their property and no law compels them to sell them to any man they don't want to sell them to; but that is not the charge in this case. The charge is not that by having difficulty in contracts in itself, these defendants did anything wrong; it is not charged here that to recommend the use of GMAC there is anything wrong; it is not charged here that cancellation for cause is anything wrongful; but the Government's theory in this case is irrespective of these contracts and independent of them and outside of them the conditions have been asserted that they, under the designation of those to the grand jurors unknown, the actions have been such that the possibility, the ability to cancel, the ability to refuse to renew a contract, have been used as clubs upon the dealers to force them to use GMAC and that these acts that are complained of were acts that were used to force the dealers to use GMAC, the Government insists that these acts inspired by that motive have been such as to result in cancellations that otherwise would not have occurred; in discriminations that would not otherwise have occurred in the shipment of cars in interstate commerce and in refusals to renew that would not otherwise have occurred, and in the use of GMAC when it otherwise would not have been used.

"In other words, the Government has no right to complain, and it may not complain of the defendants' right to limit its sales of cars to persons whom it may select, its right to determine who it shall sell to, its rights to determine upon what terms it will sell, its right to pick its own dealers.

"It can only complain if the defendants do sufficient of these acts charged in the indictment as constitute duress upon the dealer to accomplish a result that would have otherwise not have been

position" or "argument," which the jury was charged were open to General Motors, to cover acts such as arranging for the presence of agents of both Ford and CIT with

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accomplished, and to make a dealer do something that he would not have done of his own free will.

"That, almost, is the question in this case—whether the dealer could act as a free man; whether he could act of his own free will.

"The defendants say:

" 'We never imposed any restrictions upon that freedom of action.'

"The Government says it did and there is that question. If it did—if the defendants did that sort of thing—and if it resulted in an unreasonable restriction and unreasonable restraint of interstate commerce, then you would have a right to find them guilty.

"If they did not do it, this lawsuit is at an end, and that is a question which you have got to decide.

"You know, you have heard of the terms:

"Exposition;

"Persuasion;

"Argument;

"Coercion.

"They are different steps. They are graduated steps that I suppose every salesman goes through, except perhaps the last.

"In Exposition one may expound the merits of that which he has to sell; he may explain its nature and by his exposition make a clear picture of what he has.

"By persuasion he may endeavor to persuade the person to whom he is talking to accept that which he has to offer.

"There is little advancement in his further progress, to argue.

"Persuasion means something softer than argument, perhaps, but he may argue with him, and argue with him the respective merits of his product and other products being offered to the person to whom he makes his offer.

"All of these are proper.

"He may not go beyond that and use something that is within his power to use as a club to coerce the person to accept that which he has to offer.

. . . . .

"You must remember that, after all, this coercion, if you find that coercion exists, then the ultimate question is; Has that resulted in unreasonable restraint of interstate commerce? And that is a question for you to determine from all of the evidence."

a view to putting the claims of CIT to a dealer or recommending, endorsing, and advertising CIT to a dealer. But all these acts were specifically forbidden Ford by the consent decree. The Government's insistence is that since the indictment charged that advertising, endorsement and recommendation violated the Sherman Law and since evidence was introduced to support the charge, the jury might have found General Motors and GMAC guilty of "coercion" at least partly on the basis of that evidence. But sub-paragraph 12 (a) (2) was not designed to authorize speculative reconstruction of the jury's process in reaching its verdict. It provided a definite standard for ascertaining what rules of law were at a future date to be made binding on a competitor of Ford. The rules which the trial judge formulated against General Motors were thereafter to be the rules of law against Ford. The trial judge used the word "coercion" to summarize practices which, if the jury found them to exist, would call for a verdict against General Motors. He used the words "persuasion," "exposition" and "argument" to describe conduct which, in common usage, is not "coercion" and therefore would not support such a verdict. Nothing in other portions of the judge's charge erases or blurs this line of distinction. The restraints imposed by the paragraphs appellants seek to have suspended are properly described by the terms "exposition," "persuasion" and "argument." So long as these paragraphs remain in effect and so long as there is no comparable decree enjoining their substance against General Motors and GMAC, Ford and CIT cannot do without risk of violating the consent decree that which General Motors and GMAC are free to do. Only a lawyer who is obtuse or reckless would advise Ford and CIT that they could subject a dealer to "persuasion," "exposition" or "argument" without the hazard of contempt of the paragraphs under discussion. Thus the conditions have been fulfilled which entitled

Ford and CIT to suspension of the restraints imposed by those terms of the decree.

Quite apart from Ford's and CIT's consent to forego the opportunities outlawed by sub-paragraphs 6 (e), (i), (k) and 7 (d), the Government urges that a court of equity should refuse to suspend or modify them by claiming that the practices restrained by those paragraphs are in any event illegal under the Sherman Law. But since this has neither been admitted nor proven, and since ascertainment of illegality under the Sherman Law normally depends on the circumstances of a particular situation and the inferences they yield, the appellants have a right to insist that, so long as interdiction of these practices has not been decreed against General Motors, the Government be put to its proof. The lifting of the restraints imposed by the consent decree does not, of course, affect the liability of Ford for any violations of the Sherman Law that the Government may establish in court. Moreover, to the extent that such restraints may at some future date be imposed on General Motors, they will, by sub-paragraph 12a (3), equally fetter Ford.

There remains for consideration the question whether the District Court properly extended the prohibition against affiliation between Ford and a finance company. This was the sixth time that the Government had applied for extension. The equity suit begun more than six years earlier had not yet been brought to trial. The court was faced at the same time with a motion for suspension of the prohibition against affiliation which was made by appellants under the express provision of paragraph 12 reserving the right to such a motion. The court denied the appellant's motion and granted the Government's on the ground, (1) that the "time clause" of paragraph 12 was subsidiary to the "main purpose" of paragraph 12 which was "to provide that the test of the permanency of

the bar against affiliation was to abide the outcome of the civil antitrust suit against General Motors Corporation," and (2) "That the purpose and intent of the decree will be carried out if Ford Motor Company is given the opportunity at any future time to propose a plan for the acquisition of a finance company, and to make a showing that such plan is necessary to prevent Ford Motor Company from being placed at a competitive disadvantage . . . ."

The Government seeks to support these conclusions by insisting on a mechanical application of the decision in *Chrysler Corp.* v. *United States,* 316 U. S. 556, involving a parallel prohibition against Chrysler. The *Chrysler* case was decided on June 1, 1942. In the intervening years the factors of the problem have drastically changed. More than nine years have elapsed since the criminal prosecution against General Motors was concluded; what was at the time of the *Chrysler* decision a two-year delay in obtaining a civil decree against General Motors has now stretched into a ten-year delay. Even then, six and a half years ago, this Court characterized the District Court's finding that the Government had proceeded "diligently and expeditiously" as "markedly generous." 316 U. S. at 563. At that time the Court also found support for the District Court in the fact that "the complete cessation of the manufacture of new automobiles and light trucks has drastically minimized the significance of the competitive factor." *Id.* at 564. But circumstances that were found extenuating on behalf of the Government two years after the entry of the decree are hardly compelling ten years afterward. While a showing that continuance of the bar against affiliation would cause competitive disadvantage may not, as a practical matter, unreasonably have been called for at a time when competition in the industry was completely

suspended during the indeterminate period of war, the resumption of full-scale competition makes such a showing unnecessary. And this is unaffected by the fact that automobiles are still in short supply. The appellants agreed for a limited term to refrain from pursuing conduct which, in the absence of an adjudication that it was illegal, they were otherwise free to pursue and which General Motors has always been free to pursue. There has been no such adjudication and successive extensions of the term have expired. The crucial fact now is not the degree of actual disadvantage but the persistence of an inequality against which the appellants had secured the Government's protection. Yet the Government seeks a change in the express terms of the decree which would perpetuate that inequality. The Government has not sustained the burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated. If the Government seeks to outlaw possible arrangements by Ford with a finance corporation, it must establish its case in court against Ford as against General Motors and not draw on a consent which by its very terms is not available.

The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE BLACK, dissenting.

The Court appears to accept the argument of appellants that this consent decree must be treated as though it were a contract between private persons for purchase of an automobile. But a consent decree is not a contract. A consent decree in an antitrust proceeding like a decree

entered after a contest must be treated as a judicial determination and order made in the public interest. *United States* v. *Swift & Co.*, 286 U. S. 106, 114–115. That means, I would suppose, that before the restraints in this decree are lifted, a showing should be made that such action would not tend to generate future violations of the antitrust laws. No such showing has been made here. As I see the case, modification of the decree under the circumstances shown will aid and encourage destruction of competition contrary to law. For so far as existing effective court restraints are concerned, modification will give Ford freedom to help the appellant finance companies crush their competitors.

Even though Ford and Commercial Investment Trust Corporation (C. I. T.) made no admission of the facts charged in the original complaint, the undenied allegations of the bill were sufficient to support the decree's prohibition against future competition-destroying practices. *Swift & Co.* v. *United States*, 276 U. S. 311, 327. In very brief summary, those facts, so far as relevant to the view I take, are these:

At the time the decrees were entered, Ford made and sold about 25% of all cars in the United States, Chrysler 25% and General Motors 44%. Ford and the others sell to dealers about four billion dollars' worth of cars yearly, requiring cash on delivery. The dealers then sell to retail customers. About 60% of the retail sales are on credit. Dealers not permitted to sell other makes of cars are wholly dependent upon Ford's, G. M.'s or Chrysler's favorable treatment for their business lives. The dealer agencies are for one year, but the agency contracts can be canceled on short notice and without cause. The dealers are thus economic dependents of the company whose cars they sell. While there are about 375 independent finance companies, C. I. T. and its subsidiaries, appellants here,

prior to entry of this court decree, furnished about 82% of the money for Ford dealer purchases, and 70% of that furnished for Ford retail purchases. The favored companies got this major percentage of Ford car loans because Ford supplied them with offices at its factories, kept them informed of sales, gave more liberal payment terms to its dealers who dealt with C. I. T., required dealers to keep their books and records open so that Ford could prevent transactions with other finance companies, sent Ford factory representatives with C. I. T. agents to help "persuade" dealers to do business with C. I. T., and required dealers who handled loans through others to make satisfactory explanations to Ford.

This Ford favored finance company, C. I. T., asks modification. One reason suggested for modification is that the C. I. T. group has lost a portion of Ford financing since the decree subjected them to competition with other finance companies. They complain of the decree not because it stifles competitive practice; quite the contrary, they complain because the decree infringes on C. I. T.'s monopolistic sanctuary.

In substance, the modifications requested are, (1) that Ford be permitted to acquire ownership, control, or an interest in a finance company; (2) that Ford be permitted to endorse, recommend, or advertise particular finance companies to its dealers; (3) that Ford be permitted to arrange with finance companies that its representatives go with agents of the favored company to dealers to "influence" those dealers to negotiate loans for themselves and retail purchasers only with the favored companies. Freedom to influence dealers would appear to offer a perfect opportunity for Ford and the favored finance companies to deprive Ford dealers and retail purchasers of all benefits in the way of low interest rates and liberal loan terms the dealers and retailers might otherwise

obtain from competition among the hundreds of finance companies in the country. For it is sure, if the undenied allegations of the complaint be accepted, as they should be at this stage, that the economic power of Ford over its dealers is so great that dealers who desperately need Ford cars will be helpless to resist Ford's "influence" and "persuasion," whether legalistically called "coercion" or not. Due to Ford's power, what dealer could afford to draw nice distinctions between "persuasion" and "coercion"? I can hardly believe that the showing of an agreement between Ford and C. I. T. to return to their old methods of "persuasion" would fail to support a finding of unreasonable restraint of trade.

It must be remembered that Ford neither promised, nor is it required by this court's action, to refrain from using its overpowering influence to "persuade" its dealers in the same old way. Ford and C. I. T. rely here on no showing of an intent to abide by the antitrust law; they rely on the literal language of what they treat as a contract with government prosecutors. But government officers have no power, by contract or otherwise, to permit violations of the law, even should they attempt to do so, which in this case I do not think they did. Had General Motors been acquitted on the criminal charge of violating the antitrust laws, there would be merit in the contention of Ford that government officers should not insist on continuance of this injunction against Ford. General Motors was not acquitted, but was convicted under an indictment alleging the same type of economic pressure practices enjoined by this consent decree. And the trial judge charged the jury that they had "a right to find these Defendants guilty" if they found that the Government had "proved the acts beyond all reasonable doubt that are averred in this indictment." True the court charged the jury that acts of mere "persuasion" were not enough, and

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that General Motors must have used its power "as a club to coerce." And the court explained dictionary differences in the abstract between "persuasion" and "coercion." But the jury was considering a concrete set of facts in which the language used by General Motors, in the abstract, might only amount to "persuasion," while the language plus General Motors' economic power might amount to "coercion." And the jury's verdict of guilty, viewed in the light of the court's charge, means to me that the persuasion plus economic power charged and proved in the *General Motors* case, which were in substance the identical acts and practices charged and enjoined in this case, showed use of "a club to coerce" in violation of the antitrust laws. I therefore agree with the finding of the District Court here in denying Ford's motion to modify, namely that the agreements, acts, and practices such as here enjoined constituted a proper basis for the general verdict of guilty in the *General Motors* case. Consequently, I think that the Government has fairly met the consent decree's condition with reference to the conviction of General Motors.

Nor do I believe that in the present state of the record this Court should lift the ban against Ford's acquisition of or affiliation with a finance company. The law prohibits acquisition by one corporation of the whole or any part of the stock of "another corporation . . . where the effect of such acquisition may be . . . to restrain . . . commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731–732, 15 U. S. C. § 18. There can be no doubt that affiliation between Ford and a certain group of finance companies will lessen the opportunity of other finance companies to compete for the automobile loan contracts both of dealers and retail purchasers. And where the volume of business as here involves 25% of all automobile sales

(and eventually probably in excess of 90%) the tendency to monopoly is aggravated.

Ford relies upon allegations made in its motion to modify to the effect that it will be competitively injured if denied an opportunity to affiliate with a finance company and to "persuade" its dealers to borrow from that company alone, so long as General Motors is allowed to "persuade" its dealers to borrow from a General Motors affiliate or subsidiary. But Ford has not proposed to the Court any legally allowable plan for affiliation, nor has it shown the Court that continuance of the decree will cause it to suffer a competitive disadvantage in the sale of cars. Failure of proof in these two respects was held an adequate ground for denying a motion of Chrysler Corporation to amend a decree precisely like this one. *Chrysler Corp.* v. *United States,* 316 U. S. 556, 564. We should take the same action in this case where the District Court specifically has found that Ford had failed to prove that continuance of the decree would subject Ford to a competitive disadvantage. Moreover, it is difficult to imagine how Ford could be suffering a competitive disadvantage in the sale of cars in today's famished car market. So far as this record shows, Ford would not lose the sale of a single car by leaving this decree as it is. And Ford does not rely on a desire to make a profit, secret or open, out of loans its dealers must obtain to pay Ford or loans retail purchasers must get to pay dealers. If Ford professed a desire to make loans as a finance company in open competition with other finance companies, that would be one thing. It is quite another to ask a court of equity to lift its ban in order that Ford may dictate loan terms for dealers and retail purchasers after Ford has sold the cars in the market. The only competitive disadvantage that this record reveals is that from which Ford dealers, Ford retail purchasers, and independent

loan agencies will suffer when the modification of this decree gives Ford and C. I. T. the green light.

Furthermore, the Court's action here means that the *Chrysler* decree must be modified without the showing this Court required in the *Chrysler* case. And it means that future destruction of competition in automobile financing by Ford, Chrysler, and General Motors has the tacit approval of this Court. For if Ford should after today "affiliate" with C. I. T., or renew its "persuasion" of dealers, could it be expected that this Court would thereafter hold these other companies legally responsible, even if it should be thought that today's permitted conduct ran afoul of the antitrust law? Is it conceivable that if Ford now "affiliates" with C. I. T., Ford's "vested interest," acquired with this Court's tacit approval, would be taken from Ford by a federal court?

Much talk about refined distinctions in the court's charge in the *General Motors* case cannot create doubts as to the effect of the decision today. The result will be destruction of competition in automobile financing. Hereafter dealers and retail purchasers cannot depend on competition to keep interest rates at a fair level. Their sole hope for low interest rates and loans on liberal terms will be the spontaneous generosity of Ford, General Motors, and Chrysler. It may be that monopoly in automobile loans is a good thing, but the antitrust laws assume that competition is better.

I would affirm this judgment.

MR. JUSTICE RUTLEDGE concurs in this dissent.

MR. JUSTICE DOUGLAS joins in this opinion insofar as it protests against lifting the ban on Ford's acquisition of or affiliation with a finance company.

ECKENRODE, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 28. Argued October 22, 1948.—Decided November 15, 1948.

In a suit for damages under the Federal Employers' Liability Act for the death of a railroad employee, *held* that there was no evidence in the record, nor any inference which reasonably could be drawn from the evidence, when viewed in a light most favorable to plaintiff, which could sustain a recovery. P. 330.

164 F. 2d 996, affirmed.

In a suit under the Federal Employers' Liability Act, the District Court set aside a verdict for the plaintiff and entered judgment for the defendant. 71 F. Supp. 764. The Court of Appeals affirmed. 164 F. 2d 996. This Court granted certiorari. 333 U. S. 866. *Affirmed,* p. 330.

B. Nathaniel Richter, by special leave of Court, *pro hac vice,* argued the cause for petitioner. With him on the brief was *John H. Hoffman.*

Owen B. Rhoads argued the cause for respondent. With him on the brief were *Philip Price* and *H. Francis DeLone.*

PER CURIAM.

This was a suit in the United States District Court for the Eastern District of Pennsylvania in which the petitioner claimed damages under the Federal Employers' Liability Act [1] and the Boiler Inspection Act [2] for the death of her husband while in the respondent's employ as a brakeman.

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[1] 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51.

[2] 36 Stat. 913, as amended, 45 U. S. C. § 23.

In response to specific interrogatories, the jury absolved the respondent of liability under the Boiler Inspection Act, but found that there had been such negligence as to create liability under the Federal Employers' Liability Act. It returned a verdict for petitioner. Judgment was entered upon the verdict.

The respondent moved the Court to set aside the verdict and the judgment entered thereon in accordance with its motion for directed verdict under Rule 50 of the Federal Rules of Civil Procedure. The judgment was vacated; the verdict set aside, and judgment entered in favor of the respondent. The District Court was of the opinion that there was no evidence upon which a finding of negligence could be predicated, and that, in any event, there was no evidence of a causal relation between the claimed negligence and the accident. 71 F. Supp. 764.

Upon appeal to the United States Court of Appeals for the Third Circuit, the judgment was affirmed. A rehearing was granted, and there was an affirmance with one judge dissenting. 164 F. 2d 996.

There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part,[3] to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her.

Accordingly, the judgment is

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE dissent.

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[3] 45 U. S. C. § 51.

ADKINS, ADMINISTRATRIX, *v.* E. I. DuPONT DE NEMOURS & CO., INC.

UNITED STATES, INTERVENOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1, Misc. Argued October 18, 1948.—Decided November 22, 1948.

1. Under the Act of July 20, 1892, 27 Stat. 252, as amended, 28 U. S. C. (1946 ed.) § 832 *et seq.* (now 28 U. S. C. § 1915), and Rule 75 (m) of the Federal Rules of Civil Procedure, a federal court is not without power to protect the public from having to pay heavy costs incident to the inclusion of unnecessary matters in the record in an *in forma pauperis* appeal. P. 337.

   (a) It may deny leave to appeal *in forma pauperis* if the applicant wrongfully persists in including in the record on appeal masses of matter plainly irrelevant to the issues raised on appeal. P. 337.

   (b) Under Rule 75 (m) of the Federal Rules of Civil Procedure, it may save the costs of printing by providing for a typewritten record. P. 337.

2. On a motion in a federal district court to allow an appeal *in forma pauperis,* claimants filed affidavits estimating that the cost of printing the record would be $4,000 and stating that each of them was unable to pay or give security for the costs. *Held:* The court was justified in looking further to see if the costs really should have been $4,000 and, if not, in requiring affidavits made with an appreciation of the lesser amount of expense. Pp. 338–339.

3. On a motion in a federal court for leave to appeal *in forma pauperis,* an affidavit is sufficient which states that affiant cannot, because of poverty, "pay or give security for costs . . . and still be able to provide" himself and dependents "with the necessities of life." One need not be absolutely destitute to enjoy the benefit of the *in forma pauperis* statute. Pp. 339–340.

4. In a suit in a federal district court, one of several claimants cannot be denied a right of appeal *in forma pauperis* merely because other claimants will neither give security for costs nor sign an affidavit of poverty. P. 340.

5. Counsel employed on a contingent fee basis to represent a poor plaintiff in a federal district court need not file affidavits showing that they are unable on account of poverty to pay or give security for costs in order for their client to be allowed to appeal *in forma pauperis*. Pp. 340–344.

In a suit for overtime pay under the Fair Labor Standards Act and Executive Order No. 9240, as amended, the District Court and the Court of Appeals denied leave to appeal *in forma pauperis*. Plaintiff petitioned this Court for a writ of certiorari and moved for leave to proceed *in forma pauperis*. On June 1, 1948, this Court entered an order assigning the motion for argument on October 18, 1948, and stating that it desired "to hear argument upon the questions presented by the motion for leave to proceed *in forma pauperis*, including the question as to the validity of a contingent fee agreement in connection with a suit brought pursuant to the Fair Labor Standards Act." This Court now grants certiorari (p. 336), vacates the orders denying appeal *in forma pauperis*, and remands the case to the District Court. P. 344.

John W. Porter, Jr. argued the cause and filed a brief for petitioner.

G. C. Spillers argued the cause for the E. I. DuPont de Nemours & Co., respondent. With him on the brief was *Peter B. Collins*.

Solicitor General Perlman, Assistant Attorney General Morison, Robert L. Stern, Paul A. Sweeney, Harry I. Rand and *Morton Hollander* filed a brief for the United States, intervenor. They expressed the view that this Court should remand the case to the District Court for reconsideration of the entire question of leave to proceed *in forma pauperis*—in the light of principles to be enunciated by this Court.

MR. JUSTICE BLACK delivered the opinion of the Court.

The questions presented chiefly involve the scope and application of the statute which authorizes a citizen to prosecute or defend actions in federal courts "without being required to prepay fees or costs or for the printing of the record in the appellate court . . . upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal, or to give security for the same, . . ." [1]

This action was filed in the United States District Court for the Northern District of Oklahoma by P. V. Adkins. Mr. Adkins died while the litigation was pending and his wife having been appointed administratrix of his estate was substituted as plaintiff. The original complaint claimed overtime compensation, damages and attorneys' fees on behalf of Mr. Adkins and twelve other employees of the respondent [2] "under and pursuant to the Fair Labor Standards Act of 1938 (Title 29, U. S. C. A. Secs. 201–219) and Executive Order #9240 as amended (Title 40 U. S. C. A. following Sec. 326) . . . ." [3]

From a dismissal of her complaint in the District Court and the denial by that court of her motion to set the dismissal aside and grant a new trial, petitioner filed in the District Court a motion to appeal to the United States

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[1] 27 Stat. 252, as amended, 36 Stat. 866, 42 Stat. 666, 28 U. S. C. § 832. The substance of §§ 1 to 5 of the original statute as amended has now been incorporated in §§ (a) to (e) of 28 U. S. C. § 1915.

[2] Section 16 (b) of the Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C. § 216 (b), authorized employees' suits by agents. Here the agent was acting "for a consideration contingent upon recovery." An amendment of this section, the Portal-to-Portal Act, 61 Stat. 84, 29 U. S. C. Supp. I, §§ 251–252, limited the circumstances under which such representative actions could be maintained.

[3] Executive Order No. 9240, 7 Fed. Reg. 7159 (1942), as amended, 7 Fed. Reg. 7419 (1942).

Court of Appeals for the Tenth Circuit. She also filed a motion that the appeal be allowed *in forma pauperis.* Her affidavit in support of this motion stated that petitioner was a widow 74 years of age; the estimated costs of the appeal record would be approximately $4,000; all she had was a home, inherited from her husband, appraised at $3,450; her only source of income was rent from parts of her home; and without such income she would not be able to purchase the necessities of life. No objection appears to have been filed to her motion to appeal *in forma pauperis,* but the motion was denied by the court. Apparently denial was for two reasons: (1) She could not proceed *in forma pauperis* where there were twelve other claimants involved who had filed no affidavits of poverty; (2) the court assumed that petitioner's lawyers were employed on a contingent fee basis, and was of opinion that she therefore could not appeal *in forma pauperis* unless the lawyers either prepaid the costs, gave security for costs or filed an affidavit of their poverty along with petitioner and all other claimants.

Petitioner then filed an application for appeal *in forma pauperis* in the United States Court of Appeals. This application was denied. The denial, so the record indicates, was on the ground that to appeal *in forma pauperis,* Mrs. Adkins, the twelve employees, and all the members of the law firm representing her would have to make affidavits of poverty.

Petitioner then went back to the District Court. Ten of the twelve employees filed affidavits in each of which this statement appeared: ". . . because of my poverty I am unable to pay or give security for the costs ($4,000) of such appeal and still be able to provide myself and my dependents with the necessities of life." An affidavit with identical language was filed by one member of the firm of lawyers representing petitioner. The affidavit

also stated that the firm's interest in all fees from this litigation had been assigned to affiant. No affidavit of poverty was filed by the other members of the firm. An affidavit was filed for the firm, however, stating a belief that the claims were meritorious, that appeal costs had been estimated at about $4,000, and that the total liquid assets of the firm did not exceed $2,000. One of the twelve claimants could not be located and one refused to sign an affidavit of poverty.

The district judge for the second time denied the motion to permit appeal without security for costs. His grounds seem to have been these. Two of the claimants had signed no affidavit of poverty; unless all signed, there could be no *in forma pauperis* appeal. The affidavits of petitioner, the ten claimants, and the attorneys were held insufficient in that they failed to show the precise financial condition of affiants, "whether they were or were not without property." The judge was not sure just what affiants would have to show as to property, but felt that each should prove a complete inability to pay at least a portion of the costs. All interested in the recovery, he thought, including the lawyers, "have at least got to chip in to the extent of their ability to pay; and whatever they have, they have got to put in the pot for the purpose of taking the appeal." The judge was "inclined to believe but not sure" that before Mrs. Adkins could be permitted to appeal *in forma pauperis* she must mortgage her home and "chip in" what she received on the mortgage loan. He construed all the affidavits as showing no more than that it would constitute a hardship to pay or give security for the payment of $4,000 to make the record. This statement as to "hardship" he thought did not meet the statutory requirement for an affidavit of inability to pay or secure costs due to "poverty."

Furthermore, the judge thought petitioner had designated more for the record than was needed to decide the dismissal question raised by the appeal. He therefore believed that a $4,000 record was "wholly unnecessary." Since the judge believed he was without power directly to limit the contents of the appellate record, he felt "persuaded to be more technical and more strict" on the type of *in forma pauperis* affidavits he required.

The Court of Appeals thereafter denied a second motion of petitioner to accept its appeal *in forma pauperis*. Petitioner then applied to this Court for certiorari to review the actions of the Court of Appeals and of the District Court in denying petitioner leave to appeal *in forma pauperis*. Petitioner further asked the court for leave to proceed here without giving security for costs. We set the motion down for argument. The matter has now been submitted on briefs and oral argument. The affidavits of poverty filed to proceed here *in forma pauperis* are the same as the affidavits filed in the two courts below.

If these affidavits are thought to be insufficient to support her motion, the petitioner urges that we give directions concerning additional requirements. While for our purposes the affidavits would have been more acceptable had they merely followed the language of the statute, our rules have provided no precise requirements. But the only questions presented here relate to the sufficiency of these affidavits in the two courts below. And to reach these questions, which are important, we must either accept the affidavits as sufficient or delay final consideration of the case. We accept the affidavits, grant the petition for certiorari, and the case having been fully argued, we proceed to pass on the questions presented so far as necessary. See *Steffler* v. *United States*, 319 U. S. 38.

First. We do not think the court was without power to protect the public from having to pay heavy costs incident to the inclusion of "wholly unnecessary" matters in an *in forma pauperis* appeal. Sections 1 and 4 of the statute provide that a court may exercise a limited judicial discretion in the grant or denial of the right and this Court has so held. *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45, 46. Rule 75 (m) of our present Rules of Civil Procedure reads as follows:

> APPEALS IN FORMA PAUPERIS. Upon leave to proceed in forma pauperis, the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled, to the end that the appellant may be enabled to present his case to the appellate court. [329 U. S. 870.]

We know of few more appropriate occasions for use of a court's discretion than one in which a litigant, asking that the public pay costs of his litigation, either carelessly or wilfully and stubbornly endeavors to saddle the public with wholly uncalled-for expense. So here, the court was not required to grant the petitioner's motion if she wrongfully persisted in including in the appeal record masses of matter plainly irrelevant to the issues raised on appeal. See *Estabrook* v. *King,* 119 F. 2d 607, 610. And, of course, under Rule 75 (m) the court may save the costs of printing by providing for a typewritten record. If exercise of discretion by a district court should result in an unfair and incomplete record to a litigant's injury, the court's error could be remedied. Its action would be subject to review by the appellate court. Moreover, if in obedience to court order a party should agree to a record inadequate for appellate court purposes, that court would have power, upon motion or *sua sponte,*

to require addition of material necessary to enable the court fairly to decide the appeal questions presented.[4]

Second. The statute allowing *in forma pauperis* appeals provides language appropriate for incorporation in an affidavit. One who makes this affidavit exposes himself "to the pains of perjury in a case of bad faith." *Pothier* v. *Rodman,* 261 U. S. 307, 309. This constitutes a sanction important in protection of the public against a false or fraudulent invocation of the statute's benefits. Furthermore, the statute provides other sanctions to protect against false affidavits. Section 4 authorizes a court to dismiss actions brought on affidavit of poverty "if it be made to appear that the allegation of poverty is untrue." And § 5 provides another safeguard against loss

[4] We do not mean to indicate that the issues sought to be raised by this petitioner on her appeal could have been properly presented to the Court of Appeals with nothing other than the very limited record the trial court apparently thought would be adequate. The case was dismissed because the District Court thought it had been deprived of jurisdiction by the Portal-to-Portal Act, *supra.* This Act purports to deprive federal courts of jurisdiction to enforce payment of overtime wages based on any activity except one compensable by either "(1) an express provision of a written or nonwritten contract . . . or (2) a custom or practice in effect, at the time of such activity," at the place of employment, and not inconsistent with a written or nonwritten contract governing such employment. Petitioner had contended that examination by the court of the entire record including evidence already taken by a special master would show that employees' claims for compensation were supported by express contracts or by custom. He contended that the Portal-to-Portal Act was therefore inapplicable under the facts of this case and that consequently the dismissal under that Act was erroneous. Petitioner's application to amend her complaint to conform to the evidence was denied by the court. *Cf. Maty* v. *Grasselli Chemical Co.,*.303 U. S. 197, 200–201; *Hoiness* v. *United States,* 335 U. S. 297. It would appear that the petitioner was entitled to have a record that was not so limited as to deprive the Court of Appeals of an opportunity to review these issues she raised.

by the Government due to false affidavits in that a court is permitted, in its discretion, to render judgment for costs "at the conclusion of the suit as in other cases." Consequently, where the affidavits are written in the language of the statute it would seem that they should ordinarily be accepted, for trial purposes, particularly where unquestioned and where the judge does not perceive a flagrant misrepresentation.

Here, the affidavits were not couched in the language of the statute. They went outside that language. Estimating that the costs would be $4,000, each affidavit stated that the affiant could not pay or secure $4,000. In other words, the affidavits here tied inability to pay to a fixed cost of $4,000. Under these circumstances, we think the court was justified in looking further to see if the cost really should have been $4,000 and if not, the judge was right in requiring affidavits made with an appreciation by affiants of the lesser amount of expense to which they might be subjected by the appeal.

Third. We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for the costs . . . and still be able to provide" himself and dependents "with the necessities of life." To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the

effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution. We think a construction of the statute achieving such consequences is an inadmissible one. See cases collected in 6 A. L. R. 1281–1287 for a discussion as to whether a showing of complete destitution should be made under this and similar statutes.

Fourth. We do not think that this petitioner can be denied a right of appeal under the statute merely because other claimants will neither give security for costs nor sign an affidavit of poverty. This case illustrates that such a restrictive interpretation of this statute might wholly deprive one of several litigants of a right of appeal, even though he had a meritorious case and even though his poverty made it impossible for him to pay or give security for costs. Such a deprivation would frustrate the basic purpose of the statute. This does not mean that one of several claimants financially able but unwilling to pay his proportionate part of the costs could demand the benefits of an appeal perfected by another claimant under the *in forma pauperis* statute. But it does mean in this case that the petitioner, upon making the required affidavit of poverty, was entitled to appellate review of the issues the district court decided against her, without regard to whether other claimants filed an affidavit of poverty, or paid or secured their fair part of the costs.

Fifth. Petitioner's appeal under the statute was denied in part because her attorneys, thought by the District Court to have been employed on a contingent fee basis, had not shown to the court's satisfaction that they were unable on account of poverty to pay or give security for costs. We think the statute imposes no such burden on a lawyer who is to share in the recovery through contract

by reason of his legal services. We are aware that some district and circuit courts of appeal have so construed the Act,[5] and that some have even adopted rules which impose this requirement on lawyers.[6] Other district and circuit courts of appeal have declined to interpret the statute as imposing such a burden on lawyers who represent litigants too poor to pay or secure the costs.[7]

Many states, apparently including Oklahoma where this case was tried,[8] make it illegal for lawyers to sign a bond to secure costs for their clients in any civil or criminal action. It would have been an innovation had Congress in this statute expressly permitted lawyers trying cases in federal courts to contract with their clients to pay or secure costs in their clients' cases. But it would have been a surprising legislative innovation for Congress to command that lawyers pay or secure such costs. That Congress did not do this seems to be strongly indicated by the basic statute itself.

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[5] *United States ex rel. Randolph* v. *Ross*, 298 F. 64; *Bolt* v. *Reynolds Metal Co.*, 42 F. Supp. 58; *Esquibel* v. *Atchison, T. & S. F. R. Co.*, 206 F. 863; *Feil* v. *Wabash R. Co.*, 119 F. 490; *Phillips* v. *Louisville & N. R. Co.*, 153 F. 795; *The Bella*, 91 F. 540, 543; *Boyle* v. *Great Northern R. Co.*, 63 F. 539; *Silvas* v. *Arizona Copper Co.*, 213 F. 504, 507–508.

[6] Rule 26 (1), Rules of United States Court of Appeals for the Third Circuit; Rule 18 (2), Rules of United States Court of Appeals for the Sixth Circuit; *Chetkovich* v. *United States*, 47 F. 2d 894, but see *Deadrich* v. *United States*, 67 F. 2d 318.

[7] *Quittner* v. *Motion Picture Producers and Distributors of America*, 70 F. 2d 331; *United States ex rel. Payne* v. *Call*, 287 F. 520; *Jacobs* v. *North Louisiana & Gulf R. Co.*, 69 F. Supp. 5; *Clark* v. *United States*, 57 F. 2d 214; *Evans* v. *Stivers Lumber Co.*, 2 F. R. D. 548.

[8] See Okla. Stat. tit. 5, § 11 (1941). See also *Watkins* v. *Sedberry*, 261 U. S. 571, 576; *Peck* v. *Heurich*, 167 U. S. 624, 630. But see, Radin, *Contingent Fees in California*, 28 Calif. L. Rev. 587, 589, 598 (1940).

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Section 1 of that statute is intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, "in any court of the United States" solely because his poverty makes it impossible for him to pay or secure the costs. Not content with this safeguard for the poor in federal courts, Congress in § 4 of the Act provided that "the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, . . ." Certainly a lawyer appointed under § 4 could not be required to pay the costs of an appeal. Nor could such an appointed lawyer have a burden of this kind cast upon him if Congress had required payment of a fee for appointed counsel in an amount fixed as reasonable by the court, a requirement that some state laws have provided.[9] Yet, such a "reasonable fee" fixed by a court would be a "contingent fee" should we accept respondent's argument in this case. For respondent contends that because the Fair Labor Standards Act authorizes a court to fix a reasonable fee for attorneys prosecuting overtime claims for employees, this petitioner's lawyers are on a contingent fee basis. They therefore according to respondent have a financial interest in the recovery. Consequently, respondent argues, petitioner must abandon her appeal and her claim unless these lawyers pay costs, secure them, or make affidavits of poverty.

No proof is needed that imposition of such onerous burdens on employees' lawyers would put serious obstacles in the way of employees obtaining the kind of legal representation Congress intended to provide for them in the Fair Labor Standards Act. And since § 4 of the *in forma pauperis* statute was plainly intended to assure legal representation to the poor, it is also obvious

[9] *Clay County* v. *McGregor*, 171 Ind. 634, 87 N. E. 1; *County of Dane* v. *Smith*, 13 Wis. 585; *Ryce* v. *Mitchell County*, 65 Iowa 447, 21 N. W. 771; *State* v. *Hudson*, 55 R. I. 141, 143, 179 A. 130, 131.

that the purpose of that Act could be frustrated in part by construing the statute as imposing a guarantee of appeal costs on all lawyers employed to represent the poor on a contingent basis. For if a person is too poor to pay the costs of a suit, sometimes very small in amount, how can it be imagined that he could possibly pay a fair fee except from the recovery he obtains? [10]

The statute here under consideration is not susceptible of a construction that would impose more burdens on lawyers employed by litigants unable to pay fees except on a contingent basis, than the burdens imposed on lawyers for those litigants who are able to employ counsel by the year or by payment of straight noncontingent fees. Section 3 of the statute specifically states that litigants who make affidavits of poverty shall be entitled to the same court processes, have the same right to the attendance of witnesses, and the same remedies as are provided by law in other cases. And as pointed out, § 4 of the statute makes it abundantly clear that poor litigants shall have the same opportunity to be represented by counsel as litigants in more fortunate financial circumstances. The statutory construction urged by respondent here would result in restricting the opportunities of the poor litigant in getting a lawyer who would follow his case through the appellate courts. For as was said by the Court of Appeals in *Clark* v. *United States,* 57 F. 2d 214, 216: ". . . The same poverty that compels a litigant to avail himself of this beneficent statute makes it impossible for him to hire counsel. He can procure counsel only by agreeing that out of the proceeds of his case, if there are proceeds, counsel shall be compensated. . . . In practical effect he [a poor litigant] is denied counsel if his counsel must either himself guarantee the costs

[10] See Radin, *Contingent Fees in California, supra* at p. 589; *United States ex rel. Payne* v. *Call,* 287 F. 520, 522; *Clark* v. *United States,* 57 F. 2d 214, 216.

or file an affidavit that he also is penniless. The statute was intended for the benefit of those too poor to pay or give security for costs, and it was not intended that they should be compelled to employ only paupers to represent them."

It was error to deny petitioner's motion for appeal under the statute on the ground that her lawyers had not made satisfactory affidavits of poverty. The statute requires no affidavit at all from them as a condition of appeal.

What we have said makes it unnecessary for us to pass on the contention of respondent that an agreement for a contingent fee payable out of an employee's recovery to prosecute claims under the Fair Labor Standards Act is invalid.

The orders denying appeal *in forma pauperis* are vacated and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

KORDEL *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 30. Argued October 14, 1948.—Decided November 22, 1948.

1. It is a violation of § 301 (a) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. § 331 (a), to ship in interstate commerce to the same consignee a drug and also false and misleading pamphlets designed for use in the advertisement, sale and use of the drug and constituting an essential supplement to the label on the drug—even though the pamphlets are shipped separately and at a different time. Pp. 346–350.

   (a) The phrase "accompanying such article" in § 201 (m), defining "labeling," is not restricted to labels that are on or in the article or package that is transported. Pp. 347–350.

   (b) That the pamphlets are shipped prior to or subsequent to the shipment of the drug does not prevent the drug from being "misbranded" when introduced into commerce within the meaning of § 301 (a) in spite of § 301 (k), which forbids misbranding of a drug while it is held for sale after shipment in interstate commerce. Pp. 350, 351–352.

2. That such pamphlets bear a sale price and are offered for sale is immaterial, since the Act cannot be circumvented by the easy device of a "sale" of the pamphlets where they perform the function of labeling. P. 350.

3. The fact that, in the evolution of the Act, the ban on false advertising was eliminated and its control was transferred to the Federal Trade Commission did not eliminate from the Act advertising which performs the function of labeling. P. 351.

4. Since the informations charging violations of § 301 (a) did not allege that the acts committed were done "with intent to defraud," the maximum penalty was imprisonment for not more than a year, or a fine of not more than $1,000, or both. Therefore, prosecution by information was authorized by the statute and by § 7 (a) of the Rules of Criminal Procedure. P. 348, n. 3.

164 F. 2d 913, affirmed.

Petitioner was convicted in a federal district court of violating § 301 (a) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. § 331 (a). 66 F.

Supp. 538. The Court of Appeals affirmed. 164 F. 2d 913. This Court granted certiorari. 333 U. S. 872. *Affirmed*, p. 352.

Arthur D. Herrick argued the cause and filed a brief for petitioner.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Philip Elman*, *William W. Goodrich* and *Bernard D. Levinson*.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE REED.

This case and *United States* v. *Urbuteit*, *post*, p. 355, decided this day, are here on certiorari to resolve a conflict among the circuits in the construction of the Federal Food, Drug, and Cosmetic Act of June 25, 1938. 52 Stat. 1040, 21 U. S. C. § 301 *et seq.*

Kordel was charged by informations containing twenty counts of introducing or delivering for introduction into interstate commerce misbranded drugs. He was tried without a jury, found guilty, and fined two hundred dollars on each count. 66 F. Supp. 538. This judgment was affirmed on appeal. 164 F. 2d 913.

Kordel writes and lectures on health foods from information derived from studies in public and private libraries. Since 1941 he has been marketing his own health food products, which appear to be compounds of various vitamins, minerals and herbs. The alleged misbranding consists of statements in circulars or pamphlets distributed to consumers by the vendors of the products, relating to their efficacy. The petitioner supplies these pamphlets as well as the products to the vendors. Some of the literature was displayed in stores in which the petitioner's products were on sale. Some of it was given

away with the sale of products; some sold independently of the drugs; and some mailed to customers by the vendors.

It is undisputed that petitioner shipped or caused to be shipped in interstate commerce both the drugs and the literature. Seven of the counts charged that the drugs and literature were shipped in the same cartons. The literature involved in the other counts was shipped separately from the drugs and at different times—both before and after the shipments of the drugs with which they were associated. The question whether the separate shipment of the literature saved the drugs from being misbranded within the meaning of the Act presents the main issue in the case.

Section 301 (a) of the Act prohibits the introduction into interstate commerce of any drug that is adulterated or misbranded.[1] It is misbranded according to § 502 (a) if its "labeling is false or misleading in any particular" and unless the labeling bears "adequate directions for use." § 502 (f). The term labeling is defined in § 201 (m) to

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[1] Section 301 in relevant part reads as follows:

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

"(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

"(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

. . . . . .

"(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded."

mean "all labels[2] and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." Section 303 makes the violation of any of the provisions of § 301 a crime.[3]

In this case the drugs and the literature had a common origin and a common destination. The literature was used in the sale of the drugs. It explained their uses. Nowhere else was the purchaser advised how to use them. It constituted an essential supplement to the label attached to the package. Thus the products and the literature were interdependent, as the Court of Appeals observed.

It would take an extremely narrow reading of the Act to hold that these drugs were not misbranded. A crimi-

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[2] The term label is defined as "a display of written, printed, or graphic matter upon the immediate container of any article." § 201 (k).

[3] "SEC. 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

"(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 301, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

The informations, in charging violations of § 301 (a), did not allege that the acts committed were done "with intent to defraud." Hence the maximum penalty was imprisonment for not more than a year, or a fine of not more than $1,000, or both. Prosecution by information was therefore authorized by the statute (see *Duke* v. *United States*, 301 U. S. 492) and by Rule 7 (a) of the Federal Rules of Criminal Procedure.

nal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States* v. *Resnick,* 299 U. S. 207; *Kraus & Bros.* v. *United States,* 327 U. S. 614, 621–622), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated. *United States* v. *Sullivan,* 332 U. S. 689, 693; *Winters* v. *New York,* 333 U. S. 507. But there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it. See *Roschen* v. *Ward,* 279 U. S. 337, 339.

It would, indeed, create an obviously wide loophole to hold that these drugs would be misbranded if the literature had been shipped in the same container but not misbranded if the literature left in the next or in the preceding mail. The high purpose of the Act to protect consumers who under present conditions are largely unable to protect themselves in this field [4] would then be easily defeated. The administrative agency charged with its enforcement [5] has not given the Act any such restricted construction.[6] The textual structure of the Act is not agreeable to it. Accordingly, we conclude that the phrase "accompanying such article" is not restricted to labels that are on or in the article or package that is transported.

The first clause of § 201 (m)—all labels "upon any article or any of its containers or wrappers"—clearly

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[4] See *United States* v. *Dotterweich,* 320 U. S. 277, 280; *United States* v. *Sullivan, supra,* p. 696.

[5] See § 701 and § 201 (c); 1940 Reorg. Plan No. IV, § 12, 54 Stat. 231, 5 U. S. C. § 133 (u).

[6] The Federal Security Agency by regulation (21 C. F. R. Cum. Supp. § 2.2) has ruled:

"Labeling includes all written, printed, or graphic matter accompanying an article at any time while such article is in interstate commerce or held for sale after shipment or delivery in interstate commerce."

embraces advertising or descriptive matter that goes with the package in which the articles are transported. The second clause—"accompanying such article"—has no specific reference to packages, containers or their contents as did a predecessor statute. See *Seven Cases* v. *United States,* 239 U. S. 510, 513, 515. It plainly includes what is contained within the package whether or not it is "upon" the article or its wrapper or container. But the second clause does not say "accompanying such article in the package or container," and we see no reason for reading the additional words into the text.

One article or thing is accompanied by another when it supplements or explains it, in the manner that a committee report of the Congress accompanies a bill. No physical attachment one to the other is necessary. It is the textual relationship that is significant. The analogy to the present case is obvious. We need not labor the point.

The false and misleading literature in the present case was designed for use in the distribution and sale of the drug, and it was so used. The fact that it went in a different mail was wholly irrelevant whether we judge the transaction by purpose or result. And to say that the prior or subsequent shipment of the literature disproves that it "is" misbranded when introduced into commerce within the meaning of § 301 (a), is to overlook the integrated nature of the transactions established in this case.

Moreover, the fact that some of the booklets carried a selling price is immaterial on the facts shown here. As stated by the Court of Appeals, the booklets and drugs were nonetheless interdependent; they were parts of an integrated distribution program. The Act cannot be circumvented by the easy device of a "sale" of the advertising matter where the advertising performs the function of labeling.

Petitioner points out that in the evolution of the Act the ban on false advertising was eliminated, the control over it being transferred to the Federal Trade Commission. 52 Stat. 114, 15 U. S. C. § 55 (a). We have searched the legislative history in vain, however, to find any indication that Congress had the purpose to eliminate from the Act advertising which performs the function of labeling. Every labeling is in a sense an advertisement. The advertising which we have here performs the same function as it would if it were on the article or on the containers or wrappers. As we have said, physical attachment or contiguity is unnecessary under § 201 (m) (2).

There is a suggestion that the offense in this case falls under § 301 (k) of the Act which includes misbranding of a drug while it is held for sale after shipment in interstate commerce.[7] Since the informations contain no such charge, it is therefore claimed that the judgment must be reversed. We do not agree. Section 301 (k) has a broad sweep, not restricted to those who introduce or deliver for introduction drugs in interstate commerce.[8] See *United States* v. *Sullivan, supra.* Nor is it confined to adulteration or misbranding as is § 301 (a). *Id.* It is, however, restricted to cases where the article is held for sale after shipment in interstate commerce; and, unlike § 301 (a), it does not reach situations where the manufacturer sells directly to the consumer. Cf. *United States* v. *Urbuteit, supra.* Hence we conclude that we do not disturb the statutory scheme when we refuse to take from § 301 (a) what is fairly included in it in order to leave

[7] See note 1, *supra.*

[8] The purpose of § 301 (k) was described in H. R. Rep. No. 2139, 75th Cong., 3d Sess. 3 (1938), as follows:

"In order to extend the protection of consumers contemplated by the law to the full extent constitutionally possible, paragraph (k) has been inserted prohibiting the changing of labels so as to misbrand articles held for sale after interstate shipment."

the matter wholly to the service of § 301 (k). The reach of § 301 (a) is in this respect longer. Such a transfer to § 301 (k) would create a new hiatus in the Act and thus disturb the pattern which we discern in it.

We have considered the other objections tendered by petitioner and find them without merit.

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE MURPHY and MR. JUSTICE JACKSON concur, dissenting.

I agree with the Court's interpretation of § 502 (a) and § 201 (m) of the Federal Food, Drug, and Cosmetic Act. These sections considered together provide a definition for the "misbranding" of drugs. I agree that a drug is misbranded within the meaning of the statute if false and misleading written, printed, or graphic matter is either placed upon the drug, its container or wrappers, or used in the sale of the drug as a supplement to the package label to advise consumers how to use the drug. I agree that false labels may, within the meaning of the statute, "accompany," that is go along with, a drug on its interstate journey even though not in the same carton, on the same train, in the same mail, or delivered for shipment the same day. But these agreements do not settle all the problems in this case.

The Federal Food, Drug, and Cosmetic Act does not purport to make all misbranding of drugs within the foregoing definition a federal offense. Congressional power to pass the Act is based upon the commerce clause. Consequently misbranding is only an offense if the misbranded drugs bear the statutorily defined relationships to interstate commerce. For illustration, if a person misbranded a drug which had not been and was not thereafter introduced into interstate commerce, there would be no

violation of the federal Act, whatever violation there might be of state law.

As we pointed out in *United States* v. *Sullivan,* 332 U. S. 689, the Federal Food, Drug, and Cosmetic Act creates several offenses each of which separately depends upon the relationship the misbranded drug then bears to interstate commerce. Section 301 (a) forbids the "introduction or delivery for introduction into interstate commerce" of misbranded drugs; § 301 (b) forbids misbranding while the drugs are "in interstate commerce"; § 301 (c) prohibits the "receipt" of such drugs in interstate commerce; and § 301 (k) forbids misbranding while drugs are "held for sale after shipment in interstate commerce."

The twenty counts of the information upon which this petitioner's conviction rests, charge that he had introduced drugs into interstate commerce, and that "when" he so introduced the drugs, they were "misbranded . . . in that . . . statements appearing in . . . bulletins and booklets *accompanying*" the drugs "were false and misleading." (Emphasis supplied.) The undisputed evidence as to thirteen of these counts showed that when the drugs were "introduced" into interstate commerce for shipment, they were not within any fair meaning of the word "accompanied" by the printed matter relied on as "labeling." The evidence under one count was that the drugs were shipped July 10, 1942, while the booklets said to be "labels" were sent a year and a half later, January 18, 1944. Thus, each of these counts charged a violation of the separate and distinct offense of introducing misbranded drugs into interstate commerce, prohibited by § 301 (a). The evidence proves the offense, if any, of violation of § 301 (k), which prohibits the misbranding of drugs while held for sale after an interstate shipment.

The Court's interpretation of § 301 (a) seems to me to create a new offense to make it a crime to introduce drugs into interstate commerce if they should subsequently be misbranded, even so long as eighteen months later while held for sale. This judicial action is justified in part on the ground that the offense Congress created in § 301 (k) for holding misbranded drugs for sale after interstate shipment might not reach all situations covered by the congressionally created offense defined by § 301 (a). If as the Court believes, Congress in § 301 (k) has limited the situations for which it will direct punishment for holding misbranded articles for sale, I cannot agree that we should rewrite § 301 (a) so as to broaden its coverage. If Congress left a hiatus, Congress should fill it if it so desires. While I do not doubt the wisdom of separating these offenses as Congress has here done, we must remember that there are dangers in splitting up one and the same transaction into many offenses. See *Blockburger* v. *United States,* 284 U. S. 299, 304–305.

These are serious offenses. While petitioner was fined only $200 on each count, or a total of $4,000, the maximum allowable punishment was $1,000 per count and imprisonment for one year, or for three years under other circumstances. § 303 (a). The approach of Congress in this field of penal regulation has been cautious. The language used by Congress in the present law in defining new offenses has been marked by precision. I think we should exercise a similar caution before reading into the "introduction into interstate commerce" offense, conduct which patently fits into the "held for sale" offense.

I would reverse the judgment here insofar as it rests on the thirteen counts in which the Government charged offenses under § 301 (a) and failed to prove them.

UNITED STATES *v.* URBUTEIT.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 13. Argued October 13–14, 1948.—Decided November 22, 1948.

Certain machines bearing no labeling other than name and serial number were shipped in interstate commerce. Subsequently, but as a part of the same transaction, there were shipped to the same consignee certain leaflets containing allegedly false and misleading statements relative to the value of the machines in the diagnosis, prevention, treatment and cure of disease. These leaflets were used by the consignee in explaining the use of the machines to his patients and in selling some of them to patients. *Held:* The separate shipment of the machines and leaflets did not prevent the machines from being subject to condemnation under § 304 (a) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1044, 21 U. S. C. § 334, as devices "misbranded when introduced into" interstate commerce. *Kordel* v. *United States, ante,* p. 345. Pp. 355–358. 164 F. 2d 245, reversed.

A federal district court ordered certain machines condemned under § 304 (a) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1044, 21 U. S. C. § 334. The Court of Appeals reversed. 164 F. 2d 245. This Court granted certiorari. 333 U. S. 872. *Reversed,* p. 358.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Philip Elman, William W. Goodrich* and *Bernard D. Levinson.*

H. O. Pemberton argued the cause and filed a brief for respondent.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE REED.

The United States filed a libel under the Federal Food, Drug, and Cosmetic Act (52 Stat. 1044, 21 U. S. C. § 334),

seeking seizure of 16 machines labeled "Sinuothermic." The libel alleged that the device was misbranded within the meaning of the Act (52 Stat. 1050, 21 U. S. C. § 352 (a)) in that representations in a leaflet entitled "The Road to Health" relative to the curative and therapeutic powers of the device in the diagnosis, cure, mitigation, treatment and prevention of disease were false and misleading. It charged that the leaflet had accompanied the device in interstate commerce.

Respondent, Fred Urbuteit, appeared as claimant of several of the devices. He admitted that the devices and leaflets had been shipped in interstate commerce, but denied that they were shipped together or that they were related to each other. He also denied that the statements made in the leaflet were false or misleading. The case was tried without a jury and the articles were ordered condemned. The judgment was reversed by the Court of Appeals. 164 F. 2d 245. The case is here on certiorari to resolve the conflict between it and *Kordel* v. *United States, ante,* p. 345.

Respondent Urbuteit terms himself a naturopathic physician and conducts the Sinuothermic Institute in Tampa, Florida. The machines against which the libel was filed are electrical devices allegedly aiding in the diagnosis and cure of various diseases and physical disorders such as cancer, diabetes, tuberculosis, arthritis, and paralysis. The alleged cures effected through its use are described in the allegedly false and misleading leaflet, "The Road to Health," published by Urbuteit and distributed for use with the machines.

Urbuteit shipped from Florida a number of these machines to one Kelsch, a former pupil of his who lives in Ohio. Kelsch used these machines in treating his patients and, though he did not receive them as a merchant, he sold some to patients. As part of this transaction Urbuteit contracted to furnish Kelsch with a supply of leaflets,

which were sent from Florida to Ohio at a different time than when the machines were forwarded. Kelsch used the leaflets to explain the machines to his patients.

The leaflets seem to have followed the shipment of the machines. But as *Kordel* v. *United States* holds, that is immaterial where the advertising matter that was sent was designed to serve and did in fact serve the purposes of labeling. This machine bore only the words, U. S. Patent Sinuothermic Trade Mark. It was the leaflets that explained the usefulness of the device in the diagnosis, treatment, and cure of various diseases. Measured by functional standards, as § 201 (m) (2) of the Act permits, these leaflets constituted one of the types of labeling which the Act condemns.

The power to condemn is contained in § 304 (a) and is confined to articles "adulterated or misbranded when introduced into or while in interstate commerce." [1] We do not, however, read that provision as requiring the advertising matter to travel with the machine. The reasons of policy which argue against that in the case of criminal prosecutions under § 303 are equally forcible when we come to libels under § 304 (a). Moreover, the common sense of the matter is to view the interstate transaction in its entirety—the purpose of the advertising and its actual use. In this case it is plain to us that the movements of machines and leaflets in interstate commerce were a single interrelated activity, not separate or isolated ones. The Act is not concerned with the purification of the stream of commerce in the abstract.

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[1] The relevant portion of this section reads as follows:

"Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce . . . shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found . . . ."

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The problem is a practical one of consumer protection, not dialectics. The fact that the false literature leaves in a separate mail does not save the article from being misbranded. Where by functional standards the two transactions are integrated, the requirements of § 304 (a) are satisfied, though the mailings or shipments are at different times.

The Court of Appeals held that certain evidence tendered by Urbuteit as to the therapeutic or curative value of the machines had been erroneously excluded at the trial, a ruling that we are not inclined to disturb. Petitioner claims, however, that the error was not prejudicial. The argument is that since the evidence of the false and misleading character of the advertising as respects the diagnostic capabilities of the machines was overwhelming, that false representation was adequate to sustain the condemnation, though it be assumed that the therapeutic phase of the case was not established. We do not reach that question. Since the case must be remanded to the Court of Appeals, that question and any others that have survived will be open for consideration by it.

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, MR. JUSTICE MURPHY, and MR. JUSTICE JACKSON dissent for the reasons stated in their dissent in *Kordel* v. *United States, ante,* p. 345, decided this day, although this case arises under the limitation of § 304 (a), "while in interstate commerce," which has a different scope from § 301 (k), while "held for sale after shipment in interstate commerce."

GRAND RIVER DAM AUTHORITY *v.* GRAND-HYDRO.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 6. Argued October 12–13, 1948.—Decided November 22, 1948.

1. Petitioner is a public corporation created by Oklahoma to develop and sell hydroelectric power. Respondent is an Oklahoma private corporation with the usual powers of a public utility. In a condemnation proceeding in an Oklahoma state court, petitioner sought a determination of the amount of compensation to which respondent was entitled for land of respondent which was appropriated by petitioner for a hydroelectric project on the Grand River in Oklahoma. Petitioner had a federal license, issued under the Federal Power Act, for the project; respondent did not. In the condemnation proceeding, petitioner did not rely on the Federal Power Act or on the federal license, but only on the state law of condemnation. The State Supreme Court decided that, in determining the amount of compensation to which the respondent was entitled, the value of the land for use as a power site could be taken into consideration, and that expert testimony as to that value was admissible. *Held:* The Federal Power Act has not so far affected the use or value of the land for power site purposes as to deprive it of all fair market value for those purposes and thus deprive the evidence of such value of all probative weight in this case. Pp. 361–369, 372–373.
2. The fact that the state court purported to rest its decision largely on state law does not dispense with the necessity of this Court's considering the question as to the effect of the Federal Power Act presented by this record. P. 369.
3. It is for this Court to determine whether questions of federal law were necessarily, although only impliedly, adjudicated by the state court. Pp. 369–370.
4. The State Supreme Court's statement of the Oklahoma law as to the proper measure of the value of the land in the state court condemnation proceeding is accepted here. Pp. 370–372.
5. The Court expresses no opinion as to what would be the appropriate measure of value in a condemnation proceeding brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act. P. 373.

6. A different result from that here reached is not required by provisions of the Federal Power Act relating to the determination of the rate base of a federal licensee, nor by provisions of the Act relating to recapture of a project by the United States upon expiration of a federal license. Pp. 374–375.
7. There is nothing in the Federal Power Act which requires that it be interpreted as superseding the state law of condemnation and as restricting the measure of valuation which lawfully may be used by the courts of Oklahoma in a condemnation proceeding for the acquisition of land for power site purposes by an agency of that State. P. 374.
8. No opinion is expressed upon issues which might arise in the event the Federal Power Commission passes upon a rate base for the project or the United States proceeds to recapture the project upon expiration of the federal license. Pp. 374–375.

200 Okla. 157, 201 P. 2d 225, affirmed.

A condemnation proceeding instituted by petitioner in a state court of Oklahoma, to have determined the amount of compensation to which the respondent was entitled for land appropriated by petitioner for a hydroelectric project, resulted in a verdict and judgment for a specified sum. The State Supreme Court reversed and remanded for a new trial. 192 Okla. 693, 139 P. 2d 798. The new trial resulted in a verdict and judgment for an increased amount. The State Supreme Court affirmed. 200 Okla. 157, 201 P. 2d 225. This Court denied certiorari, 332 U. S. 841, but, on rehearing, granted it, 333 U. S. 852. *Affirmed,* p. 375.

Robert Leander Davidson argued the cause for petitioner. With him on the brief was *Quince B. Boydstun.*

By special leave of Court, *Howard E. Wahrenbrock* argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Vanech, Stanley M. Silverberg, Roger P. Marquis, Willard W. Gatchell* and *Joseph B. Hobbs.*

S. Frank Fowler and *Robert Dale Hudson* argued the cause and filed a brief for respondent.

MR. JUSTICE BURTON delivered the opinion of the Court.

The federal question in this action for condemnation under Oklahoma law is whether the Federal Power Act [1] had so far affected the use or value of certain land for power site purposes as to render inadmissible expert testimony which gave recognition to that land's availability for a power site. We hold that it had not. We thus see no adequate reason to reverse the Supreme Court of Oklahoma which had held that such testimony was properly admitted in a state condemnation proceeding.

This action was brought by the petitioner, Grand River Dam Authority, in the District Court for Mayes County, Oklahoma, to condemn and to award damages for the taking of 1,462.48 acres of that land from the respondent, Grand-Hydro. Four hundred and seventeen of these acres have been used by the petitioner as a site for its hydroelectric project, near Pensacola, on the Grand River in Oklahoma. The Commissioners, appointed by the court to assess the damages sustained by the appropriation of these lands, awarded the respondent $281,802.74. Each party, however, objected and demanded a jury trial. That trial resulted in a verdict and judgment for $136,250. On appeal, the Supreme Court of Oklahoma reversed the judgment and remanded the case for a new trial in conformity with its opinion. That opinion is important in determining the issues before us. 192 Okla. 693, 139 P. 2d 798. Six judges concurred in the opinion, one in the result and two dissented.

In 1945, the new trial resulted in a verdict and judgment for $800,000, together with interest on $518,197.26

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[1] 41 Stat. 1063, as amended, 49 Stat. 838, 16 U. S. C. §§ 791a–825r.

from January 19, 1940, which was the date on which the amount fixed by the Commissioners had been paid into court. The Supreme Court of Oklahoma affirmed this judgment, seven to two. 200 Okla. 157, 201 P. 2d 225. We denied certiorari, 332 U. S. 841, but, on rehearing, granted it, 333 U. S. 852, because of the possible significance of the case in relation to the Federal Power Act. The United States filed a brief as *amicus curiae,* at each stage of the proceedings, supporting the contentions of the petitioner.[2]

The petitioner is a conservation and reclamation district, created in 1935 by the Oklahoma Legislature. It is a corporate agency of the State with power to develop and sell water power and electric energy in the Grand River Basin.[3] The respondent is a private corporation, organized in 1929 under the laws of Oklahoma. It has

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[2] The United States has a further interest in the case because the petitioner's project has been financed largely through a federal loan and grant agreement. At the time of filing its brief in support of the petition for certiorari, the Government held approximately $14,000,000 of the petitioner's revenue bonds. See also, Act of July 31, 1946, 60 Stat. 743, as to the refinancing of these bonds.

[3] Grand River Dam Authority Act, Okla. Sess. L. 1935, c. 70, Art. 4 (Sen. Bill No. 395); Okla. Sess. L. 1936–1937, c. 70, Art. 1 (Sen. Bill No. 299), and Art. 2 (House Bill No. 3); Okla. Stat. Ann. tit. 82, §§ 861–881 (1938). The power of eminent domain is granted to the petitioner by § 2 (f) of the original Act.

"SECTION 2. POWERS, RIGHTS AND PRIVILEGES.

. . . . . .

"(f) To acquire by condemnation any and all property of any Kind, real, personal, or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation;"

. . . . . .

Okla. Sess. L. 1935, c. 70, Art. 4.

the usual powers of a public utility, including the power to develop and use the waters of the Grand River, construct dams, generate and distribute electricity and acquire by right of eminent domain, purchase or otherwise, real and personal property for its purposes. The Grand River is treated as a nonnavigable stream, tributary to the Arkansas River which is a navigable stream.

Long prior to this litigation the respondent acquired the acreage in question for use in its proposed development of hydroelectric power on the Grand River. In 1931, it obtained from the State Conservation Commission a state license and permit to appropriate the waters of Grand River for beneficial use, to construct a dam on that river, and there to develop hydroelectric power for sale.[4] The respondent, however, never has filed with the Federal Power Commission any declaration of intention or application for a federal license relative to this project.

In February, 1934, the City of Tulsa filed an action in an Oklahoma court against the respondent and others seeking an adjudication of certain water rights in Spavinaw Creek and in the Grand River near Pensacola. During the pendency of that action the Oklahoma Legislature created the Grand River Dam Authority, petitioner herein, and granted to it exclusive authority to develop the Grand River in the manner described in the Act. In effect, the petitioner thus acquired a state priority over the respondent, although the respondent held title to certain water rights and to the land needed for the project. The petitioner thereupon was made a party to the Tulsa action. However, before filing its answer and cross-petition, the petitioner entered into an agreement for the voluntary assignment to it by the respondent of the

[4] Okla. Rev. L. 1910, c. 40; Okla. Sess. L. 1927, c. 70 (House Bill No. 62); Okla. Stat. Ann. tit. 82, §§ 451–510 (1938).

latter's rights to appropriate certain river waters for the project.[5] It likewise secured from the respondent the latter's title to 45 acres essential to the dam site. In due course, judgment was rendered awarding to the petitioner a prior right to control and appropriate the required water from the river and stating that the respondent had no right therein. The petitioner secured from the respondent a voluntary conveyance of title to ten additional acres and also of certain rights of entry upon 362 acres. These made up the 417 acres referred to as the dam site. As later found by the Supreme Court of Oklahoma—

> "The conveyances of the land were made on condition that the consideration would later be determined by agreement or condemnation and the assignment was on the condition provided for therein:
>
> " 'It is understood, however, that this assignment and conveyance shall not, in any way, affect or impair the title of Grand-Hydro to any lands owned by it, or any interests therein, and if any lands or interests therein owned by the said Grand-Hydro are acquired by the Grand River Dam Authority by purchase or condemnation, the value thereof or damage thereto shall be ascertained and determined as though this assignment and conveyance had never been made.' " *Grand River Dam Authority* v. *Grand-Hydro,* 200 Okla. 157, 158, 201 P. 2d 225, 227.

The parties being unable to agree upon the price for the land, the petitioner filed the present action in February, 1939. The petition made no reference to the Federal Power Act or to rights claimed thereunder. The petitioner, on the other hand, based its claim upon the

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[5] This lower court proceeding is thus described in *Grand-Hydro* v. *Grand River Dam Authority,* 192 Okla. 693, 697–698, 139 P. 2d 798, 803–804.

right to acquire the land by condemnation "in the manner provided by general law with respect to condemnation" which had been granted to the petitioner by the Grand River Dam Authority Act.[6] The project was to be located on the upper reaches of the Grand (or Neosho) River, near Pensacola, above the river's confluence with Spavinaw Creek. In the meantime, on December 15, 1937, the petitioner had filed with the Federal Power Commission a declaration of intention under § 23 (b) of the Federal Power Act.[7] In that declaration the petitioner stated that—

> "The construction of said project will probably not affect present or prospective navigation for the reason that the Grand River is not a navigable stream in law or in fact, and the navigability of the Arkansas and Mississippi rivers will not be appreciably affected thereby. The construction of said project will

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[6] See note 3, *supra.*

[7] "SEC. 23. . . .

"(b) . . . Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." 49 Stat. 846, 16 U. S. C. § 817.

not affect any public lands or reservations of the United States, or the interests of interstate or foreign commerce."

If the Commission had agreed with the foregoing statement, § 23 (b) would have permitted construction of the dam merely upon petitioner's compliance with state laws. However, on February 11, 1938, the Commission found that—

"(c) The construction and operation of said project as proposed by the declarant will affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is tributary;

"The Commission therefore *finds* that:

"The construction and operation of said project in the manner proposed by the declarant will affect the interests of interstate commerce."

Thereupon, the petitioner sought and, on July 26, 1939, secured from the Commission the federal license required for the project as one affecting navigable waters and reservations of the United States. The petitioner, however, has not, by amendment or otherwise, based its right of condemnation in the present case upon the Federal Power Act or upon any federal license issued thereunder.

This proceeding was brought in an Oklahoma court, by a government agency of Oklahoma, to exercise a right of condemnation granted by Oklahoma. It does not seek to condemn or to award damages for water rights. It seeks only to condemn certain land and to assess damages due to the taking of that land. At the original trial, the court excluded from the jury evidence of the value of the land insofar as such evidence was based upon the availability of that land for a dam site. On appeal, the Supreme Court of Oklahoma held that such exclusion constituted reversible error and it remanded the case for

retrial in conformity with its opinion. That opinion stated the law of Oklahoma as follows:

"The measure of compensation in such case is the fair market or cash value of the land condemned. City of Tulsa v. Creekmore, 167 Okla. 298, 29 P. 2d 101. In that case the court, speaking of the elements to be considered in determining market values, said:

" 'It is the market value that is the test and not its value for some particular use to which it might be subjected, although its adaptability to this particular use may be considered as one of the factors in ascertaining the market value when they enter into and affect the cash market value of the property. Revell v. City of Muskogee, 36 Okla. 529, 129 P. 833; Public Service Co. v. Leatherbee, 311 Ill. 505, 143 N. E. 97.'

"And in the syllabus by the court the fair cash or market value of land taken in eminent domain is defined as follows:

" 'By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.'

"With reference to the question of adaptability or availability for a particular use as an element in determining market value, the court held as follows:

" 'In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might

in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.'

"The above case contains a reasonably clear statement of the law obtaining in this state and which must be applied here. The condemnee is ordinarily entitled to compensation measured not only by the value of the land for the use to which he has applied it, but the value thereof for all possible purposes, present and prospective, to which he or his ordinary grantee might legally apply the same." *Grand-Hydro* v. *Grand River Dam Authority*, 192 Okla. 693, 694, 139 P. 2d 798, 800.

After retrial and on a second appeal to it, the Supreme Court of Oklahoma reaffirmed the law of that State in the following terms, and pointed to the federal question which the petitioner and the United States, as *amicus curiae*, now place before us:

"In this appeal the new or different facts and issues presented consist of the competency of the testimony, as presented in the last trial, of the expert witnesses as to the market value of the dam site; the submission of such testimony to the jury under proper instructions; the effect of Grand-Hydro's lack of a permit from the Federal Power Commission; the trial court's refusal to allow counsel to argue to the jury that the condemned land had no dam site value because of such fact; and the allowance of interest.

. . . . . .

"Appellant contends that the passage of the act creating the Authority was, in effect, a forfeiture of the Grand-Hydro [state] permit and therefore it was not entitled to recover the dam site value of the

lands condemned. If such was the intent of the Legislature in passing the act, it was in violation of the Constitution, art. 2, sec. 24. The state cannot, through its law-making body, remove the principal value of private property and, through its established agency acquire the property by condemnation, basing the reimbursement to the owner on the reduced value. If it were otherwise, it would be possible to circumvent the above section of our Constitution. . . .

. . . . . .

"The testimony of the expert witnesses as introduced was, therefore, competent to prove the dam site value of the property and was in accord with our opinion on the former appeal. . . .

"Although the Authority had been granted a license by the Federal Power Commission granting it the exclusive right to use the 417-acre tract as a dam site, it could not thereby take private property without just compensation." *Grand River Dam Authority* v. *Grand-Hydro,* 200 Okla. 157, 160, 201 P. 2d 225, 227, 228.

As the question is thus presented whether the Federal Power Act has so far affected the use or value of this land for power site purposes as to deprive it of all fair market value for those purposes and thus deprive the evidence of such value of all probative weight in this case, the fact that the state court purported to rest its decision largely on state law does not eliminate our duty to consider the question to the extent that it arises under federal law.[8] Again, it is suggested that the Federal

[8] See *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 164; *Nutt* v. *Knut,* 200 U. S. 12, 19; and *United States* v. *Bellingham Bay Boom Co.,* 176 U. S. 211, 218. See also, *Davis* v. *Wechsler,* 263 U. S. 22, 24–25; and *American Railway Express Co.* v. *Levee,* 263 U. S. 19.

Power Act has superseded the state law and has set up a new standard of valuation binding upon the state even in a condemnation proceeding under state law. It is, of course, for us to examine whether questions of federal law were necessarily, although only impliedly, adjudicated by the state court. We accept the law of Oklahoma, set forth in the above quotations, as stating the proper measure of the value to be given to this land in this state proceeding. The respective parties have put different interpretations upon this statement of the Oklahoma law but the Supreme Court of that State has settled the issue in favor of the respondent's interpretation. The petitioner points to the following statement of the Oklahoma court:

> "The condemnee is ordinarily entitled to compensation measured not only by the value of the land for the use to which he has applied it, but the value thereof for all possible purposes, present and prospective, to which he or his ordinary grantee might *legally* apply the same." (Emphasis supplied.) *Grand-Hydro* v. *Grand River Dam Authority,* 192 Okla. 693, 694, 139 P. 2d 798, 800.

The petitioner then argues that, by virtue of its special act of incorporation, it holds a grant from Oklahoma of the exclusive right to develop this power site insofar as the State is concerned, and that it holds a grant from the United States of the only federal license that has been issued for the development of this site. The respondent, on the other hand, holds neither a state permit nor a federal license to use this land for a power site, although it originally acquired the land for that purpose and later conveyed it to the petitioner for that purpose, under an agreement which has postponed, until now, the determination of its purchase price. The petitioner, with the help of the respondent's conveyance to it of this

land and of the respondent's assignment to it of certain water rights, has secured judicial recognition of a prior right in itself to appropriate under state law certain water from the river, and has secured from the Federal Power Commission the above-mentioned license required under the Federal Power Act. Thus equipped, the petitioner has erected its dam on the dam site.

Accordingly, if the correct interpretation of the law of Oklahoma is that, in order for the respondent to introduce evidence of the value of the land for a dam site, the respondent must show not only that the land is reasonably and lawfully usable for that purpose, but also that the respondent itself holds a valid state permit or federal license for the construction of the dam on that land, then it is clear that the evidence would not be admissible. However, the Supreme Court of Oklahoma has settled this issue in favor of the respondent by holding that such a permit or license is not necessary in order for the evidence to be considered. As to the state permit, it has held expressly in its second opinion, as quoted at pp. 368–369 of this opinion, that the Grand River Dam Authority Act did not deprive the respondent of its right to compensation from the petitioner for the value of the dam site as such. In fact, the court there said that such a result would violate the Constitution of Oklahoma. In that same opinion, as quoted at p. 369 of this opinion, that court settled the issue that possession of a federal license by the respondent was not necessary in order for the respondent to introduce evidence of the value of this land as a dam site. The court so held when it expressly approved the action of the trial court in admitting the evidence in question when offered on behalf of the respondent in the absence of any federal license to the respondent and in the face of the federal license already issued to the petitioner.

The Supreme Court of Oklahoma stands squarely upon the law of the case which it announced upon the first appeal of this case. Its original statement as made at that time and as further interpreted on the second appeal holds that it was enough, for the present purposes, that the use of the land for a dam site was a reasonable and lawful use to which the land might be applied, without showing that the respondent itself held a permit or license authorizing it to build the dam. It may be surmised that the Supreme Court of Oklahoma, in approving the admission of the testimony by the trial court, also treated the petitioner as being the respondent's "ordinary grantee" of the title to this land. It is not necessary for us to determine whether that court relied upon one or the other, or both, of these alternatives. Reliance on either would make the disputed evidence admissible under the Oklahoma law.

Under this interpretation of the state law the answer to the remaining federal question is obvious. It is clear that the Federal Power Act cannot be said to have so far affected the use of this land for a power site as to destroy or otherwise render valueless the owner's right to use it for that purpose. That Act merely has attached conditions to the use of the land for a power site. The Act seeks to encourage rather than to prohibit the development of power sites. It seeks to preserve or enhance, not to destroy, their value as such. While the Act has limited the time and manner of the use of this particular land for a power site, the Act has left great benefits available to the owner from such a use of the land. The present large development of this site by the petitioner under a federal license is convincing proof of the value and availability of the land for that purpose.

In a voluntary purchase of this land by the petitioner, as a willing purchaser, from the respondent, as a willing

and unobligated seller, the value of it as a power site inevitably would have entered into the negotiated price. The petitioner and the respondent long have been competitors for the development of this site for power purposes. Each was granted, by state law, a right to condemn the land but the petitioner gained a priority over the respondent by virtue of the Grand River Dam Authority Act. The petitioner's purchase amounts to an acquisition of private property for a public use. The petitioner makes no claim to any right to make use of the natural asset of water power in the streams of the State without paying the fair market value of the land occupied for that purpose.

As between these two corporations seeking to determine the sales price of this land, the Federal Power Act placed no limitation upon their voluntary negotiations. The present proceeding is in substance a part of their original agreement for the sale of the land by the respondent to the petitioner.

If either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act, it might face different considerations from those stated above. The United States enjoys special rights and power in relation to navigable streams and also to streams which affect interstate commerce. The United States, however, is not a party to the present case. It is not asserting its right to condemn this land. The petitioner, likewise, is not seeking to enforce such rights as it might have to condemn this land by virtue of its federal license.[9] Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act.

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[9] 41 Stat. 1074, 16 U. S. C. § 814.

It has been suggested that the provisions of the Federal Power Act bearing upon the allowance of a valuation for the project as part of the rate base of a federal licensee may be material in this case.[10] Whatever the relation of those provisions may be to this project, it is not such as to change the Oklahoma law as to the fair market value of the land between the parties to this case. It may be that, at some later date when the petitioner, as a federal licensee, shall be ready to sell power, the Commission or other appropriate body will then give consideration to the value to be allowed for this land in the petitioner's rate base. There is, however, nothing in the Federal Power Act that purports to prescribe the price which a purchaser of land may pay voluntarily and in good faith for land which it later incorporates into a project. There also is nothing in the Act which prescribes that the seller, rather than the purchaser, or that the condemnee, rather than the condemnor, of land acquired for a project must absorb the reduction, if any, which is to be made later in the allowance of value for that land in the purchaser's rate base as compared with the original price paid for it by the purchaser in a negotiated purchase or in a state condemnation proceeding. As to the question whether the Federal Power Act should be interpreted as actually superseding the state law of condemnation and as restricting the measure of valuation which lawfully may be used by the courts of Oklahoma in a condemnation action for the acquisition of land for power site purposes by an agency of that State, there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws.[11]

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[10] 41 Stat. 1073, 16 U. S. C. §§ 812, 813, and see 41 Stat. 1071, as amended, 49 Stat. 844, 16 U. S. C. § 807.

[11] Even in a condemnation action brought in a district court of the United States under authority of the Federal Power Act, the practice

There also has been a suggestion made of the possible materiality in this case of those provisions of the Federal Power Act which relate to the price to be paid by the United States in the event that it takes over the project of a licensee upon or after the expiration of a federal license.[12] The issues raised by that suggestion are comparable to those just discussed in relation to the rate base of a federal project, except that such a recapture of the project is even more remote than the determination of a rate base for the computation of rates to be charged for its product. We accordingly express no opinion upon the issues which may arise when, as and if the above-mentioned proceedings may be taken.

For these reasons, the judgment of the Supreme Court of Oklahoma is

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join, dissenting.

The result of this decision, no matter how it is rationalized, is to give the water-power value of the current of a river to a private party who by reason of federal law neither has nor can acquire any lawful claim to it. The United States has asserted through the Federal Power Act its exclusive dominion and control over this water power.[1] That Act specifies how one may acquire

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and procedure is to conform as nearly as may be with that in the courts of the state where the property is situated. See 41 Stat. 1074, 16 U. S. C. § 814.

[12] 41 Stat. 1071, as amended, 49 Stat. 844, 16 U. S. C. § 807.

[1] The exclusive control which the United States has in the water power of a navigable stream (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69; *United States* v. *Appalachian Electric Co.*, 311 U. S. 377, 427–428) extends to the water power of a non-

a license to exploit it, § 23 (b), and the conditions under which the licensee must operate. See *First Iowa Coop.* v. *Federal Power Comm'n,* 328 U. S. 152.

Petitioner has such a license. Respondent has none and, for reasons unnecessary to relate here, concededly cannot obtain one. Respondent therefore has no claim to the water-power value which the law can recognize, if the policy of the Federal Power Act is to be respected. When respondent's claim is recognized, the effect is to make petitioner pay a private claimant for a privilege which only the United States can grant.

That is the bald result whether the condemnation takes place in a state or a federal court. Whatever the procedure, the consequence is to give private parties an entrenched property interest in the public domain, which the Federal Power Act was designed to defeat.

The public burden is the same and the impairment of the policy of the federal act is identical whether the judgment is entered by a state or a federal court. Never before, I believe, has a federal right been allowed less protection in a state court than it is entitled to receive in the federal court.[2]

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navigable stream where private command over it is inconsistent with the federal program of control over navigation. *United States* v. *Willow River Co.,* 324 U. S. 499, 509. Federal regulation and control has the same effect in each case. *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508, 525.

It has been found in this case (and is unchallenged here) that the construction and operation of this project will affect the navigable stages of the Arkansas River, a navigable water of the United States, to which the Grand River is tributary. See H. R. Doc. No. 242, 67th Cong., 2d Sess. 123 (1921); H. R. Doc. No. 107, 76th Cong., 1st Sess. 6 (1939); Act of August 18, 1941, 55 Stat. 645.

[2] Article VI of the Constitution makes Acts of Congress "the supreme law of the land" and directs that "the judges in every State shall be bound thereby."

Syllabus.

VERMILYA-BROWN CO., INC. ET AL. *v.* CONNELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 22. Argued October 15, 1948.—Decided December 6, 1948.

If otherwise applicable, the Fair Labor Standards Act covers employees of American contractors engaged in the construction of a military base for the United States in an area in Bermuda leased by Great Britain to the United States for 99 years—even though the leased area is under the sovereignty of Great Britain and is not territory of the United States in a political sense. Pp. 378–390.

1. The question whether the Act applies in this area is not a political question beyond the competence of courts to decide. P. 380.

2. Under the power granted by the Constitution, Art. IV, § 3, cl. 2, to make "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," Congress has power to regulate labor contracts where the incidents regulated occur in areas under the control, though not within the territorial jurisdiction or sovereignty, of the United States. P. 381.

3. Under the terms of the particular lease under which this area was leased by Great Britain to the United States, the United States is authorized by the lessor to provide for maximum hours and minimum wages for employers and employees within the area. Pp. 382–383.

4. Neither the lack of specific reference to leased areas in the legislative history of the Fair Labor Standards Act nor the fact that this particular Bermuda base was acquired after the passage of the Act prevents the Act from covering such areas. Pp. 383–385.

5. In the circumstances of this case and in the light of the broad purpose of the Act, of the fact that the Act applies to far-off islands whose economy differs markedly from our own, and of the fact that Congress has extended the coverage of other acts to such bases, the word "possession," used by Congress to define the geographical coverage of this Act, is construed as making the Act applicable to employer-employee relationships in the area of foreign territory on Bermuda under lease for a military base. Pp. 386–390.

164 F. 2d 924, affirmed.

Certain employees of American contractors engaged in the construction of a military base for the United States in an area on Bermuda leased by Great Britain to the United States sued for overtime pay under the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. §§ 201 *et seq.* On defendants' motion for a summary judgment, the District Court dismissed the complaint on the ground that the applicability of the Act depended upon a political question outside of judicial power. 73 F. Supp. 860. The Court of Appeals reversed. 164 F. 2d 924. This Court granted certiorari. 333 U. S. 859. *Affirmed,* p. 390.

Charles Fahy argued the cause for petitioners. With him on the brief were *Joseph Markle, Franklin Nevius, J. Randall Creel* and *Philip Levy.*

Sol L. Firstenberg argued the cause for respondents. With him on the brief was *Jacob Bromberg.*

Solicitor General Perlman, Assistant Attorney General Morison, Robert L. Stern, Paul A. Sweeney and *Melvin Richter* filed a brief for the United States, as *amicus curiae,* urging reversal.

Mr. Justice Reed delivered the opinion of the Court.

This case brings before us for review the applicability of the Fair Labor Standards Act of 1938, 52 Stat. 1060, to employees allegedly engaged in commerce or the production of goods for commerce on a leasehold of the United States, located on the Crown Colony of Bermuda.

The leasehold, a military base, was obtained by the United States through a lease executed by the British Government. This lease was the result of negotiations adequately summarized for consideration by the letters of the Marquess of Lothian, the British Ambassador to the United States, of date September 2, 1940; the reply

of Mr. Cordell Hull, then our Secretary of State, of the same date; and the Agreement of March 27, 1941, between the two nations to further effectuate the declarations of the Ambassador in his letter.[1]

The Fair Labor Standards Act covers commerce "among the several States or from any State to any place outside thereof." State means "any State of the United States or the District of Columbia or any Territory or possession of the United States." § 3 (b) and (c) of the Act.

Certain employees of contractors who had contracts for work for the United States on the Bermuda base brought this suit under § 16 (b) of the Act for recovery of unpaid overtime compensation and damages, claimed to be due them for the employer's violation of § 7, requiring overtime compensation. We do not enter into any consideration of the employees' right to recover if the Fair Labor Standards Act is applicable to employment on the Bermuda base, for the complaint was dismissed on defendant's motion for summary judgment on the ground that the applicability depended upon the "sovereign jurisdiction of the United States," that the executive and legislative branches of the Government had indicated that such leased areas were not under our sovereign jurisdiction and that this was a political question outside of judicial power. *Connell* v. *Vermilya-Brown Co.*, 73 F. Supp. 860. The United States Court of Appeals for the Second Circuit, holding that the Act applied to the Bermuda base, reversed this judgment and remanded the case to the District Court for further proceedings on the merits. 164 F. 2d 924. Our affirmance of this judgment approves that disposition of the appeal.

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[1] 55 Stat. 1560, 1572, 1576, 1590.

Those documents are published in Department of State publication No. 1726, Executive Agreement Series 235.

On account of the obvious importance of the case from the standpoint of administration, in view of the number of leased areas occupied by the United States, we granted certiorari. 333 U. S. 859.

(1) We shall consider first our power to explore the problem as to whether the Fair Labor Standards Act covers this leased area. Or, to phrase it differently, is this a political question beyond the competence of courts to decide? Cf. *Coleman* v. *Miller,* 307 U. S. 433, 450; *Colegrove* v. *Green,* 328 U. S. 549, 552. There is nothing that indicates to us that this Court should refuse to decide a controversy between litigants because the geographical coverage of this statute is involved. Recognizing that the determination of sovereignty over an area is for the legislative and executive departments, *Jones* v. *United States,* 137 U. S. 202, does not debar courts from examining the status resulting from prior action. *De Lima* v. *Bidwell,* 182 U. S. 1; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652. We have no occasion for this opinion to differ from the view as to sovereignty expressed "for the Secretary of State" by The Legal Adviser of the Department in his letter of January 30, 1948, to the Attorney General in relation to further legal steps in the present controversy after the judgment of the Court of Appeals. It was there stated:

> "The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States."

Nothing in this opinion is intended to intimate that we have any different view from that expressed for the Secretary of State. In the light of the statement of the Department of State, we predicate our views on the issue presented upon the postulate that the leased area is under the sovereignty of Great Britain and that it is not territory

of the United States in a political sense, that is, a part of its national domain.

(2) We have no doubt that Congress has power, in certain situations, to regulate the actions of our citizens outside the territorial jurisdiction of the United States whether or not the act punished occurred within the territory of a foreign nation. This was established as to crimes directly affecting the Government in *United States* v. *Bowman,* 260 U. S. 94. This Court there pointed out, p. 102, that clearly such legislation concerning our citizens could not offend the dignity or right of sovereignty of another nation. See *Blackmer* v. *United States,* 284 U. S. 421, 437; *Skiriotes* v. *Florida,* 313 U. S. 69, 73, 78. *A fortiori* civil controls may apply, we think, to liabilities created by statutory regulation of labor contracts, even if aliens may be involved, where the incidents regulated occur on areas under the control, though not within the territorial jurisdiction or sovereignty, of the nation enacting the legislation.[2] This is implicitly conceded by all parties. This power is placed specifically in Congress by virtue of the authorization for "needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Constitution, Art. IV, § 3, cl. 2.[3] It does not depend upon sovereignty in the political or any sense over the territory. So the Administrator of the Wage-Hour Division has issued a statement of general policy or interpretation that directs all officers and agencies of his division to apply this Act to the Canal Zone, admittedly territory over which we do not have sovereignty. 29 C. F. R., 1947 Supp., pp. 4392–93.

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[2] No due process question arises from this extension of legislation over such controlled areas such as was considered to bar state action concerning contracts made and to be performed beyond the boundaries of a state. Cf. *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 407, with *Alaska Packers Assn.* v. *Comm'n,* 294 U. S. 532, 541.

[3] Cf. *Ashwander* v. *T. V. A.,* 297 U. S. 288, 330, *et seq.*

(3) In this view of the relationship of our government to a leased area, the terms of this particular lease become important. Reference, note 1, *supra,* has been made to the United States Statutes where the title documents are readily available. It is unnecessary to print them here in full. In the margin are extracts that indicate their meaning as to the control intended to be granted.[4] Under

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[4] 55 Stat. 1560:

Article I, "(1) The United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control, . . ."

Article XI, "(4) It is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." P. 1565.

Article XIII, "(1) The immigration laws of the Territory shall not operate or apply so as to prevent admission into the Territory, for the purposes of this Agreement, of any member of the United States Forces posted to a Leased Area or any person (not being a national of a Power at war with His Majesty the King) employed by, or under a contract with, the Government of the United States in connection with the construction, maintenance, operation or defence of the Bases in the Territory; but suitable arrangements will be made by the United States to enable such persons to be readily identified and their status to be established." P. 1565.

Article XIV, "(1) No import, excise, consumption or other tax, duty or impost shall be charged on—

. . . . . .

"(*c*) goods consigned to the United States Authorities for the use of institutions under Government control known as Post Exchanges, Ships' Service Stores, Commissary Stores or Service Clubs, or for sale thereat to members of the United States forces, or civilian employees of the United States being nationals of the United States and employed in connection with the Bases, or members of their families resident with them and not engaged in any business or occupation in the Territory;" P. 1566.

Article XXIX, "During the continuance of any Lease, no laws of the Territory which would derogate from or prejudice any of the

this agreement we have no doubt that the United States is authorized by the lessor to provide for maximum hours and minimum wages for employers and employees within the area, and the question of whether the Fair Labor Standards Act applies is one of statutory construction, not legislative power.

(4) At the time of the enactment of the Act, June 25, 1938, the United States had no leased base in Bermuda. This country did have a lease from the Republic of Cuba of an area at Guantanamo Bay for a coaling or naval station "for the time required for the purposes of coaling and naval stations." The United States was granted by the Cuban lease substantially the same rights as it has in the Bermuda lease.[5] The time limits of the grant were redefined on June 9, 1934, as extending until agreement for abrogation or unilateral abandonment by

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rights conferred on the United States by the Lease or by this Agreement shall be applicable within the Leased Area, save with the concurrence of the United States." P. 1570.

There are also articles arranging for postal facilities and tax exemptions.

[5] 1 Malloy, Treaties, Conventions, International Acts, Protocols and Agreements (S. Doc. No. 357, 61st Cong., 2d Sess.) 359:

"While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof."

Id., 361. See Joint Resolution No. 24, April 20, 1898, on the recognition of the independence of Cuba, 30 Stat. 738; the Act of March 2, 1901, in fulfillment thereof, 31 Stat. 898, Art. VII; Treaty with Cuba proclaimed June 9, 1934, 48 Stat. 1682, 1683, Art. III.

the United States. A similar arrangement existed in regard to the Panama Canal Zone.[6] Further, in the Philippine Independence Acts of January 17, 1933, and March 24, 1934, provisions existed looking toward the retention of military and other bases in the Philippine Islands. 47 Stat. 761, §§ 5 and 10; 48 Stat. 456, §§ 5 and 10.[7] A Convention between the governments of Nicaragua and the United States of America, proclaimed June 24, 1916, 39 Stat. 1661, gave the United States for 99 years "sovereign authority" over certain islands in the

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[6] Isthmian Canal Convention, 33 Stat. 2234:

"The United States of America and the Republic of Panama being desirous to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific oceans, and the Congress of the United States of America having passed an act approved June 28, 1902, in furtherance of that object, by which the President of the United States is authorized to acquire within a reasonable time the control of the necessary territory of the Republic of Colombia, and the sovereignty of such territory being actually vested in the Republic of Panama, the high contracting parties have resolved for that purpose to conclude a convention and have accordingly appointed as their plenipotentiaries, —"

Id., 2235:

"Article III.

"The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

[7] Through the Joint Resolution of June 29, 1944, 58 Stat. 625, these provisions were effectuated in leases for 99 years by an agreement of March 14, 1947. 61 Stat. 2834, Treaties and International Acts No. 1611. The rights of control over the areas obtained by the United States from the Republic of the Philippines are quite similar to those obtained over the Bermuda base.

Caribbean Sea.[8] None of these international arrangements were discussed in reports or the debates concerning the scope of the Fair Labor Standards Act. After the passage of the Fair Labor Standards Act and during World War II, a number of bases for military operations were leased by the United States not only on territory of the British Commonwealth of Nations but on that of other sovereignties also. The provisions of these leases paralleled in many respects the Bermuda lease.[9]

Neither this lack of specific reference in the legislative history to leased areas, however, nor the fact that the particular Bermuda base was acquired after the passage of the Act seems to us decisive of its coverage. "The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms." [10] The Sherman Act of 1890, a date when we had no insular possessions, was held by its use of the word "Territory" in its § 3 to be applicable in Puerto Rico, a dependency acquired by the Treaty of Paris in 1898.[11] The answer as to the scope of the Wage-Hour Act lies in the purpose of Congress in defining its reach.

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[8] The power of control over leased areas obtained by the United States through the above leases is not greater than that ordinarily exercised by sovereign lessees of foreign territory. See 34 American Journal of International Law 703; Lawrence, Principles of International Law (6th ed., 1915) 175; H. R. Doc. No. 1, 56th Cong., 2d Sess., 386; Oppenheim's International Law (6th ed. by Lauterpacht, 1947) 412–14. Oppenheim contains numerous illustrations of leases by an owner-state to a foreign power. His views upon the leases of the bases herein referred to correspond to that of our Department of State and to the postulate as to sovereignty stated in this opinion.

[9] *E. g.*, 55 Stat. 1245, Executive Agreement Series 204 (Greenland); 56 Stat. 1621, Executive Agreement Series 275 (Liberia).

[10] *Browder* v. *United States,* 312 U. S. 335, 339; *Barr* v. *United States,* 324 U. S. 83, 90.

[11] *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 257.

(5) The point of statutory construction for our determination is as to whether the word "possession," used by Congress to bound the geographical coverage of the Fair Labor Standards Act, fixes the limits of the Act's scope so as to include the Bermuda base. The word "possession" is not a word of art, descriptive of a recognized geographical or governmental entity. What was said of "territories" in the *Shell Co.* case, 302 U. S. 253, at 258, is applicable:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed."

The word "possession" has been employed in a number of statutes both before and since the Fair Labor Standards Act to describe the areas to which various congressional statutes apply.[12] We do not find that these examples sufficiently outline the meaning of the word to furnish

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[12] Federal Employers' Liability Act, 35 Stat. 65, § 2, 45 U. S. C. § 52 (1908) ("Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States . . . .");

Neutrality Act, 40 Stat. 231, § 1, 18 U. S. C. § 39 (1917) ("The term 'United States' . . . includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.");

Bank Conservation Act, 48 Stat. 2, § 202, 12 U. S. C. § 202 (1933) (". . . the term 'State' means any State, Territory, or possession of the United States, and the Canal Zone.");

Federal Communications Act, 48 Stat. 1064, 1065, § 3 (g), as amended, 47 U. S. C. § 153 (g) (1934) (" 'United States' means the several States and Territories, the District of Columbia, and the pos-

a definition that would include or exclude this base. While the general purpose of the Congress in the enactment of the Fair Labor Standards Act is clear,[13] no

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sessions of the United States, but does not include the Canal Zone.");

Food, Drug, and Cosmetic Act, 52 Stat. 1040, § 201 (a), 21 U. S. C. § 321 (a) (1938) ("The term 'Territory' means any Territory or possession of the United States, including the District of Columbia and excluding the Canal Zone.");

Federal Firearms Act, 52 Stat. 1250, § 1 (2), as amended, 15 U. S. C. § 901 (2) (1938) ("The term 'interstate or foreign commerce' means commerce between any State, Territory or possession (not including the Canal Zone), or the District of Columbia, and any place outside thereof; . . .");

Investment Company Act, 54 Stat. 795, § 2 (a) (37), as amended, 15 U. S. C. § 80a–2 (37) (1940) (" 'State' means any State of the United States, the District of Columbia, Alaska, Hawaii, Puerto Rico, the Canal Zone, the Virgin Islands, or any other possession of the United States.");

Nationality Act, 54 Stat. 1137, § 101 (e), 8 U. S. C. § 501 (e) (1940) ("The term 'outlying possessions' means all territory . . . over which the United States exercises rights of sovereignty, except the Canal Zone.");

War Damage Corporation Act, 56 Stat. 174, 176, § 2, 15 U. S. C. § 606b–2 (a) (1942) ("Such protection shall be applicable only (1) to such property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States . . . .").

The War Damage Corporation Act and the Defense Base Act, 56 Stat. 1035, 42 U. S. C. § 1651 (1942), *infra*, note 16, use terms different from "possession" to describe these leased areas. When these acts were passed, however, the problems posed by the bases were specifically considered by Congress. Hearings on H. R. 6382, House of Representatives, 77th Cong., 2d Sess., p. 27; 88 Cong. Rec. 1851. Thus they afford no touchstone as to the meaning of the Fair Labor Standards Act, where such problems were not specifically considered.

[13] *United States* v. *Darby*, 312 U. S. 100, 115:

"The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that in-

such definite indication of the purpose to include or exclude leased areas, such as the Bermuda base, in the word "possession" appears. We cannot even say, "We see what you are driving at, but you have not said it, and therefore we shall go on as before." [14] Under such circumstances, our duty as a Court is to construe the word "possession" as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind.

The word "possession" in the Act includes far-off islands whose economy differs markedly from our own. Thus the employees of Puerto Rico, Guam, the guano islands, Samoa and the Virgin Islands have the protection of the Act. See 29 C. F. R., 1947 Supp., 4393. Since drastic change in local economy was not a deterrent in these instances, there is no reason for saying that the wage-hour provisions of the Act were not intended to bring these minimum changes into the labor market of the bases.[15] Since its passage of the Act, Congress has extended the coverage of the Longshoremen's and Harbor Workers' Compensation Act to the bases acquired since January 1,

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terstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows."

Substandard conditions included excessive hours of labor. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577.

[14] *Johnson* v. *United States*, 163 F. 30, 32.

[15] When Congress dealt with coverage in the National Labor Relations Act, enacted July 5, 1935, 49 Stat. 449, 450, it used a narrower definition of commerce, one restricted to States and Territories. That has been held to cover Puerto Rico but we are not advised of any application to the bases. Cf. *Labor Board* v. *Gonzalez Padin Co.*, 161 F. 2d 353.

1940, and to Guantanamo Bay.[16] When one reads the comprehensive definition of the reach of the Fair Labor Standards Act, it is difficult to formulate a boundary to its coverage short of areas over which the power of Congress extends, by our sovereignty or by voluntary grant of the authority by the sovereign lessor to legislate upon maximum hours and minimum wages. Under the terms of the lease, we feel sure that the House of Assembly of Bermuda would not also undertake legislation similar to our Fair Labor Standards Act to control labor relations on the base. Since citizens of this country would be numerous among employees on the bases, the natural legislative impulse would be to give these employees the same protection that was given those similarly employed on the islands of the Pacific.

Under subdivisions 2 and 3, *supra,* we have pointed out that the power rests in Congress under our Constitution and the provisions of the lease to regulate labor relations on the base. We have also pointed out that it is a matter

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[16] Defense Base Act, 56 Stat. 1035, 42 U. S. C. § 1651 (1942). This act extends the coverage of the Longshoremen's and Harbor Workers' Compensation Act to "any employee engaged in any employment—

"(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

"(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); . . . ."

This extension was necessary because of the prior limited language of the Act which covered injuries "occurring upon the navigable waters of the United States," the term "United States" being defined to mean "the several States and Territories and the District of Columbia, including the territorial waters thereof." 44 Stat. 1424, 33 U. S. C. §§ 902, 903.

It will be noted that Guantanamo Bay and the Canal Zone were included in the lists as "possessions."

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of statutory interpretation as to whether or not statutes are effective beyond the limits of national sovereignty. It depends upon the purpose of the statute. Where as here the purpose is to regulate labor relations in an area vital to our national life, it seems reasonable to interpret its provisions to have force where the nation has sole power, rather than to limit the coverage to sovereignty. Such an interpretation is consonant with the Administrator's inclusion of the Panama Canal Zone within the meaning of "possession."

We think these facts indicate an intention on the part of Congress in its use of the word "possession" to have the Act apply to employer-employee relationships on foreign territory under lease for bases. Such a construction seems to us to carry out the remedial enactment in accord with the purpose of Congress.

Affirmed.

MR. JUSTICE JACKSON, dissenting.

The serious question in this case is not as to the meaning of the Fair Labor Standards Act. It means just what it says when it provides that it shall apply in any Territory or possession of the United States and I would apply it to every foot of soil that, up to the time of this decision, has been regarded as our possession.

The real issue here, and it is a novel one, is whether this Court will construe the lease under which the United States occupies a military base in Bermuda as adding it to our possessions. The labor for which overtime under the Act is sought was performed for a government contractor on this military base. The base did not exist when the Act was passed and it does not either expressly or impliedly purport to cover work in that area, unless the word "possession" shall be construed to include the leased lands. Whether it is appropriate or permissible to hold

as matter of law that our tenure there constitutes the leasehold area a possession obviously turns on a reading of the lease from Great Britain.

The Court of Appeals read the lease to give "sweeping powers" to the United States and declared that "the areas are subject to fully as complete control by the United States as obtains in other areas long known as 'possessions' of the United States." It names as comparable possessions Alaska, Hawaii, Puerto Rico, Guam, Samoan Islands, Virgin Islands and the Canal Zone. This Court seems to approve that premise because it affirms, citing some if not all of the same examples; but it also says, ". . . it is difficult to formulate a boundary to its [the Act's] coverage short of areas over which the power of Congress extends, . . . to legislate upon maximum hours and minimum wages." [1]

Thus application of the Act to the leased area is put on two grounds: first, that the area is a possession of the United States; and second, since the Act applies to those "engaged in commerce or in the production of goods for commerce," [2] it operates wherever Congress has power to act with respect to commerce. Presumably the Court will not shrink from applying the converse of the latter proposition; that the Act does not apply where this country or its nationals are not engaged in commerce.

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[1] This is the more striking because it is said concerning an Act which we have held does not, even in continental United States, exercise or purport to exercise the full scope of the commerce power. See, *e. g., McLeod* v. *Threlkeld,* 319 U. S. 491, 493; *Kirschbaum Co.* v. *Walling,* 316 U. S. 517.

[2] Section 6 of the Act requires every employer (as defined therein) to pay the prescribed rates to each employee who is "engaged in commerce or in the production of goods for commerce"; and § 7 forbids overtime employment, except at prescribed rates, of any employee who is "engaged in commerce or in the production of goods for commerce." 29 U. S. C. §§ 206, 207.

Bermuda and like bases are not, in my opinion, our possessions on a juridical and geopolitical footing with the possessions enumerated. I also believe that there is not and under the lease there can not be in the leased area any "commerce" subject to the Act.

To consider the bases as possessions in that sense is incompatible with the spirit of the negotiations and with the letter of the lease by which the bases were acquired. It enlarges the responsibilities which the United States was willing to accept and the privileges which Great Britain was willing to concede. This will appear from the history of the transaction whose meaning we interpret.

When organized resistance in the Low Countries and in France went down and the German *Wehrmacht* stood poised on Europe's Atlantic seaboard, it was suspected, as it since has been proved, that the design for conquest embraced seizure of Atlantic islands as a pathway for future operations against the United States.[3] Disasters on land and sea had brought threat of invasion of the British Isles nearer to reality than at any time since the Spanish

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[3] On October 29, 1940, Major (General Staff) Freiherr von Falkenstein, from the Fuehrer's headquarters, wrote a secret "résumé of the military questions current here." The 5th item thereof reads:

"The Fuehrer is at present occupied with the question of the occupation of the Atlantic Islands with a view to the prosecution of war against America at a later date. Deliberations on this subject are being embarked upon here. Essential conditions are at the present:

"a. No other operational commitment,

"b. Portuguese neutrality,

"c. Support of France and Spain.

"A brief assessment of the possibility of seizing and holding air bases and of the question of supply is needed from the GAF."

3 Nazi Conspiracy and Aggression (GPO 1946), p. 289; 3 Trial of Major War Criminals (GPO 1947), p. 389, Document No. 376–PS received in evidence Dec. 10, 1945; see Nazi Conspiracy and Aggression: Opinion and Judgment (GPO 1947), p. 45.

Armada. Consequently, Great Britain could divert no forces to the defense of her island possessions in our hemisphere, which after all were strategic spots to assail our commerce and stepping stones to our gateways.[4] Great Britain, however, desperately in need of destroyers to defend her shores, intimated a readiness to put the United States in a position to defend these islands and the Americas as a *quid pro quo* for overaged American destroyers.[5]

Among those who saw in the development of air warfare a necessity for moving our air defense outposts seaward from the cities which dot our own shores, an influential and respected group favored asking England to cede her island possessions in this hemisphere to us as an outright transfer of sovereignty. If this cession had been asked and granted, the Court would now rightly hold the bases to be our "possessions." But it was President Roosevelt himself who determined for this country that it was the part of wisdom neither to seek nor to accept sovereignty or supreme authority over any part of these islands. He decided that it was in our self-interest to limit the responsibilities of the United States strictly to establishment, maintenance and operation of military, naval and air installations. His reasons have been partially disclosed[6] and one of them, apparent to anyone

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[4] "I understand that in the view of the American technical authorities modern conditions of war, especially air war, require forestalling action, in this case especially in order to prevent the acquisition by Hitler of jumping-off grounds from which it would be possible, bound by bound, to come to close quarters with the American Continent." Mr. Churchill to House of Commons, July 9, 1941. Churchill, *"The Unrelenting Struggle,"* pp. 175–176.

[5] Stimson, *"On Active Service in Peace and War,"* Vol. II, pp. 356–358.

[6] Hull, *"Memoirs,"* p. 834; Stimson, *"On Active Service in Peace and War,"* Vol. II, pp. 356–358.

The former points out, of the President, that "He also knew the penurious condition of the native populations of most of the islands,

even casually travelled in those islands, was the great disparity of social, economic and labor conditions between the islands and our Continent. Also he knew full well the different customs and institutions prevailing there, particularly the relations between the white, colored and native races, and the difficulty of assimilating them into the American pattern—a prospect that would arouse emotional tensions in this country as well as in the Islands and which indeed caused some anxiety even in Westminster.[7] Thus it was settled American policy, grounded, as I think, on the highest wisdom, that, whatever technical form the transaction should take, we should acquire no such responsibilities as would require us to import to those islands our laws, institutions and social conditions beyond the necessities of controlling a military base and its garrison, dependents and incidental personnel.

Knowledge of that policy and purpose gives a measure of the novel and dubious grounds for the Court's present determination to put these bases upon the legislative and juridical footing of "Territories and possessions." It is a first step in the direction of the very imprudence that was sought to be avoided by the limited tenure devised for the bases.

But if American interests neither require nor admit of the assumption that the bases have become our possessions, the bounds of the grant as understood and expressed by Great Britain deny it with even more compelling force. The confined character of the granted priv-

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and consequently did not want to assume the burden of administering those populations. Therefore he had changed, during my absence from Washington, from his original idea of outright purchase of the bases to that of ninety-nine-year leases. I had originally favored outright cession, but was willing to agree to leases instead." P. 834.

[7] See Parliamentary Debates, Commons, Vol. 370, p. 255, *et seq.*, and Vol. 376, p. 567, *et seq.*

ileges and their incompatibility with either sovereignty or proprietorship on our part appear from the letter of the Marquess of Lothian to Secretary Hull of September 2, 1940, which committed the United Kingdom to grant to the United States "the lease for immediate establishment and use of Naval and Air bases and facilities for entrance thereto and the operation and protection thereof," on the Great Bay of Bermuda.[8] All of the specific provisions of the formal lease were subsidiary to and within this general measure of the rights yielded. It comprehended all that it was intended to bestow and all that we intended to take. Its dimensions were well defined by Mr. Stimson as "the right to fortify and defend." [9]

Details of the formal lease do but emphasize the common purpose of Great Britain to so confine the concession and that of President Roosevelt to so circumscribe our responsibilities. The leasehold right of the United States, in war time or emergency, to conduct military operations on land, water or in the air, which was the heart of the matter for us, is without bounds or restrictions except for a pledge of good neighborliness and friendly cooperation in their exercise.

The leasehold terms, however, are well chosen, carefully to deny every commercial and political right to the United States except as they are incidental and appurtenant to this primary military usufruct. American nationals cannot go there for any purpose other than governmental except in conformity to Bermudian laws. Its immigration laws are relaxed only to admit "any member of the United States Forces posted to a Leased Area" and "any person (not being a national of a Power at war

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[8] 55 Stat. 1560, 1572; Executive Agreement Series 235, Department of State (GPO 1942), pp. 14–15.

[9] Stimson, *"On Active Service in Peace and War,"* Vol. II, p. 356.

with His Majesty the King) employed by, or under a contract with, the Government of the United States in connection with the construction, maintenance, operation or defence of the Bases." Even so, the lessee must submit to measures to identify such persons and to establish their status. In what formerly recognized possession of the United States mentioned by the Court is American citizens' privilege of ingress and egress, of transit and of residence, so limited?

Private trade and commerce by our citizens likewise are wholly in control of the Colony and are no more dependent upon our laws than in any other part of the United Kingdom or any foreign country. Bermudian customs duties are waived only on material for construction and maintenance of our bases, for consumption by our garrisons and supporting personnel, and on their household goods; and we undertake to prevent abuse of this customs privilege and to prevent resale of such imports. This is not greater than the immunity allowed by every foreign country to our diplomatic corps and staffs, and the power reserved by Britain over imports and customs is wholly inconsistent with the concept that these are our possessions.

The lease also expressly and unconditionally provides that no business can be established in the leased area and that no person shall habitually render any professional services except for the Government and its personnel. No wireless or submarine cable may be operated except for military purposes. Are such stifling restraints by another state consistent with the idea of our possession?

Payment of local income and property taxes are only waived as against those in the area when they are members of our armed forces, employees engaged in our works or contractors with our Government. In short, no actual possession of the United States used by the Court as a standard of reference is so insulated from the United

States in fiscal, social, economic, commercial and political affairs. In none is the commerce power of Congress so stripped of subject matter for regulation or our permissible range of activity so circumscribed.

Possessions such as Puerto Rico, Guam, the guano islands, Samoa and the Virgin Islands, which the Court mentions as standards for the treatment of Bermuda, are, in vital respects, as different from it as night from day. Not one of them is subject to even a frivolous claim adverse to our complete ownership. They belong to us or they belong to no one. They are ceded territory over which United States sovereignty is as complete and as unquestioned as over the District of Columbia and they are subject to no dual control or divided allegiance. They are incorporated into our economy, freely trading in our markets, and "protected" by our tariff walls. They are integrated with our social and, in some degree at least, with our political life as well; some of them being authorized to send delegates to our Congress.

On the other hand, however, Bermuda never has ceased in its entirety to be a Crown Colony of Great Britain. Social, industrial and labor conditions prevailing at the Island bases are such that both nations made every effort to insulate them from the damaging effects of our limited occupation for military purposes. It seems to me unsound policy as well as capricious statutory interpretation for the Court blindly to mingle them by imposing statutory policies that were not shaped with their existence or peculiarities in mind. It may be that, in some matters, the same policies suited to our legitimate possessions will also be considered adaptable to the bases. But it is not necessarily or presumptively so, and where the bases are to be brought into our scheme of things, it should be deliberately and consciously done by the Congress, in particular matters and with particular

regard to local conditions,[10] and perhaps after consultation with the United Kingdom or Colonial authorities. We should not by the process of judicial interpretation impose upon the bases not only the policies of the Act before us but those of many Acts not involved here and as to which we are even less informed.[11]

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[10] The following statutes use language expressly covering the leased bases or language which seems to imply that the statute will reach as far as there is power to make it reach:

I. Statutes which explicitly cover the leased bases:

55 Stat. 622, as amended, 42 U. S. C. § 1651 (1).

II. Statutes employing the phrase "places subject to the jurisdiction of the United States" or similarly sweeping language:

38 Stat. 270, as amended, 12 U. S. C. § 466; 58 Stat. 624, as amended, 10 U. S. C. Supp. I, § 1213; 56 Stat. 176, 15 U. S. C. § 606b–2 (a); 61 Stat. 512, 16 U. S. C. Supp. I, § 776a (c); 40 Stat. 231, 18 U. S. C. § 39; 35 Stat. 1136, 18 U. S. C. § 387; 35 Stat. 1138, as amended, 18 U. S. C. § 396; 54 Stat. 1134, as amended, 18 U. S. C. § 396a; 49 Stat. 494, 18 U. S. C. § 396b; 35 Stat. 1148, 18 U. S. C. § 511; 40 Stat. 559, as amended, 22 U. S. C. § 226; 42 Stat. 361, 22 U. S. C. § 409; 52 Stat. 631, as amended, 22 U. S. C. § 611 (m); 58 Stat. 643, 22 U. S. C. § 701; 32 Stat. 172, as amended, 46 U. S. C. § 95; Rev. Stat. § 4438a, as amended, 46 U. S. C. § 224a (6); 35 Stat. 1140, 46 U. S. C. § 1351; 40 Stat. 217, 219, as amended, 50 U. S. C. §§ 31, 37; 54 Stat. 1179, 50 U. S. C. App. § 512; 56 Stat. 177, as amended, 50 U. S. C. App. § 633 (4), (6); 56 Stat. 185, 50 U. S. C. App. § 643a; 58 Stat. 624, 50 U. S. C. App. § 777; 56 Stat. 390, 50 U. S. C. App. § 781; 60 Stat. 211, 50 U. S. C. App. § 1828 (c).

[11] The following tabulation of statutes whose coverage provisions are so similar to those being construed as to either be governed by today's decision or to require most sophisticated distinctions shows in what a network of legislation the Court is entangling the bases:

I. Statutes employing the term "possessions,"

(a) in the phrase "States, Territories, and Possessions" or the like:

43 Stat. 1070, as amended, 2 U. S. C. § 241 (i); 42 Stat. 998, 7 U. S. C. § 3; 42 Stat. 159, 7 U. S. C. § 182 (6); 49 Stat. 731, 7 U S. C. § 511 (i); 30 Stat. 544, as amended, 11 U. S. C. § 1 (10); 48 Stat. 2, 12 U. S. C. § 202; 39 Stat. 601, as amended, 61 Stat. 786, 14 U. S. C. Supp. I, § 29; 55 Stat. 11, 12, as amended, 14 U. S. C. Supp. I,

Neither should we embark upon a course of making the same naked words mean one thing in one Act and something else in another. It cannot be pretended that such an interpretation as the Court announces is in response to any demonstrable intention of Congress on the

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§§ 302, 307; 48 Stat. 882, as amended, 15 U. S. C. § 78 (c) (16); 54 Stat. 790, 15 U. S. C. § 80a–2 (37); 44 Stat. 1406, 15 U. S. C. § 402 (c); 44 Stat. 1423, 15 U. S. C. § 431; 47 Stat. 8, as amended, 61 Stat. 202, 15 U. S. C. Supp. I, § 607; 61 Stat. 515, 15 U. S. C. Supp. I, § 619; 52 Stat. 1250, as amended, 15 U. S. C. § 901 (2); 56 Stat. 1087, 18 U. S. C. § 420g (2); 42 Stat. 1486, 21 U. S. C. § 61 (b); 52 Stat. 1041, 21 U. S. C. § 321 (b); Int. Rev. Code §§ 22 (b) (4), 251, 252, 1621 (a) (8) (B), 813 (b); 49 Stat. 1928, 27 U. S. C. § 222 (a); 28 U. S. C. § 411 (a); 61 Stat. 150, 29 U. S. C. Supp. I, § 161 (2); 61 Stat. 86, 90, 29 U. S. C. Supp. I, §§ 252 (d), 262 (e); 29 U. S. C. App. Supp. I, § 203.7; 55 Stat. 179, 30 U. S. C. § 4*o*; 54 Stat. 1086, 31 U. S. C. § 123; Rev. Stat. § 3646, as amended, 31 U. S. C. § 528 (c); 61 Stat. 787, 33 U. S. C. Supp. I, §§ 883a, 883b; 44 Stat. 900, as amended, 39 U. S. C. § 654 (c); 49 Stat. 2038, 41 U. S. C. § 39; 58 Stat. 682, as amended, 42 U. S. C. § 201 (g); 49 Stat. 624, as amended, 42 U. S. C. § 405 (d); 50 Stat. 888, 42 U. S. C. § 1402 (12); 60 Stat. 774, 42 U. S. C. § 1818; 35 Stat. 65, 45 U. S. C. § 52; 52 Stat. 1107, as amended, 45 U. S. C. § 362; 45 Stat. 1492, as amended, 46 U. S. C. § 85; 49 Stat. 888, 46 U. S. C. § 88; Rev. Stat. § 4472, as amended, 46 U. S. C. § 170; Rev. Stat. § 4370, 46 U. S. C. § 316 (a); 41 Stat. 996, as amended, 46 U. S. C. § 813; 39 Stat. 735, 46 U. S. C. §§ 819, 823, 826, 829; 40 Stat. 901, as amended, 46 U. S. C. § 835 (a), (d); 41 Stat. 998, 46 U. S. C. §§ 880, 882, 883; 41 Stat. 1003, 46 U. S. C. § 951; 49 Stat. 2016, 46 U. S. C. § 1244 (a), (b); 49 Stat. 1212, 46 U. S. C. § 1312; 48 Stat. 1065, as amended, 47 U. S. C. § 153 (e), (g); 48 Stat. 1084, 47 U. S. C. § 308 (c); 48 Stat. 1087, 47 U. S. C. § 314; 44 Stat. 568, 572, 573, 49 U. S. C. §§ 171, 176 (c), 179; 52 Stat. 977, 979, 980, 984, 998, 49 U. S. C. §§ 401 (3), (21) (b), (29), (30), 425, 486; 40 Stat. 415, as amended, 50 U. S. C. App. § 5; 60 Stat. 50, as amended, 50 U. S. C. App. § 32 (a) (2) (B); 54 Stat. 890, as amended, 50 U. S. C. App. § 308; 61 Stat. 31, 32, 50 U. S. C. App. Supp. I, §§ 324, 326 (a) (2), (3); 54 Stat. 859, as amended, 50 U. S. C. Supp. I, § 403 (b) (A); 56 Stat. 777, 50 U. S. C. App. § 574; 59 Stat. 542, 50 U. S. C. App. § 639a; 56 Stat. 182, as amended, 50 U. S. C. App § 640; 55 Stat. 206, 50 U. S. C. App. § 702;

subject, for when this Act was passed the Bermuda base was not in being nor was it within the contemplation of even the more foresighted.

It should be enough to dispose of this matter to point out that the United States has no supreme authority or sovereign function in Bermuda, where every commer-

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56 Stat. 461–62, 50 U. S. C. App. §§ 791, 792, 793, 801; 56 Stat. 1041, 50 U. S. C. App. § 846; 56 Stat. 23, as amended, 50 U. S. C. App. § 901; 56 Stat. 245, as amended, 50 U. S. C. App. § 1191 (i); 57 Stat. 162, as amended, 50 U. S. C. App. § 1472 (a) (A);

(b) qualified, usually in a similar phrase, by the word "island" or "insular":

54 Stat. 1137, 1139, 8 U. S. C. §§ 501 (e), 604; 59 Stat. 526, as amended, 12 U. S. C. Supp. I, § 635; 38 Stat. 730, 15 U. S. C. § 12; 48 Stat. 74, as amended, 15 U. S. C. § 77b (6); 61 Stat. 726, 16 U. S. C. Supp. I, § 758a; 56 Stat. 1046, 21 U. S. C. § 188d; 56 Stat. 1063, 22 U. S. C. § 672 (b); Int. Rev. Code §§ 2563, 2602, 2733 (g); 49 Stat. 2011, as amended, 46 U. S. C. § 1204; 40 Stat. 388, 50 U. S. C. § 137; 53 Stat. 812, 50 U. S. C. § 98f.

II. Statutes listed under heading I above, the application of which to the leased bases might cause conflict with Bermudian law:

42 Stat. 998, as amended, 7 U. S. C. § 3 (Commodity Exchange Act); 42 Stat. 159, 7 U. S. C. § 182 (6) (Packers and Stockyards Act, 1921); 49 Stat. 731, 7 U. S. C. § 511 (i) (Tobacco Inspection Act); 54 Stat. 1139, 8 U. S. C. § 604 (Nationality Act of 1940); 59 Stat. 526, as amended, 12 U. S. C. Supp. I, § 635 (Export-Import Bank Act of 1945); 55 Stat. 11, 12, as amended, 14 U. S. C. Supp. I, §§ 302, 307 (Coast Guard Reserve Act); 38 Stat. 730, 15 U. S. C. § 12 (Clayton Act); 42 Stat. 1486, 21 U. S. C. § 61 (b) (Filled Milk Act); 56 Stat. 1063, 22 U. S. C. § 672 (b) (Settlement of Mexican Claims Act); Int. Rev. Code §§ 22 (b) (4), 813 (b); 29 U. S. C. App. Supp. I, § 203.7 (Rules and Regulations implementing the National Labor Relations Act as amended by the Labor Management Relations Act); 49 Stat. 624, as amended, 42 U. S. C. § 405 (d) (Subpoena provision of the Federal Old-Age and Survivors Insurance Benefits Act); 50 Stat. 888, 42 U. S. C. § 1402 (Low Rent Housing Act); 60 Stat. 774, 42 U. S. C. § 1818 (Atomic Energy Act); 35 Stat. 65, 45 U. S. C. § 52 (Federal Employers' Liability Act); 52 Stat. 1107, as amended, 45 U. S. C. § 362 (Railroad Unemp. Ins. Act); Rev. Stat. § 4370, as amended, 46 U. S. C. § 316 (a) (Act for the

cial activity is subject to control by another sovereign which is our political superior in the island. We have no commercial rights in Bermuda in the sense of private enterprise such as Congress by this Act sought to regulate. The United States cannot in good faith conduct or permit its nationals to engage in industry, manufacture or trade there. It cannot authorize them to conduct commerce there or to produce goods for commerce, which are the conditions which this Act itself makes necessary to bring the Labor Standards Act into play. To do so would be a flagrant breach of good faith with the United Kingdom and an overreaching of the people of Bermuda. Small wonder that the Department of State feels constrained to inform us that it "regards as unfortunate" the conclusion of the court below, which is now affirmed, and adds a warning that any holding that the bases are "possessions" of the United States in a political sense "would not in the Department's view be calculated to improve our relations with that Government." [12]

Regulation of Vessels in Domestic Commerce); 41 Stat. 999, 46 U. S. C. § 883 (Merchant Marine Act, 1920); 49 Stat. 2017, 46 U. S. C. § 1244 (a) (Merchant Marine Act, 1936); 49 Stat. 1212, 46 U. S. C. § 1312 (Carriage of Goods by Sea Act); 48 Stat. 1065, 1084, 1087, as amended, 47 U. S. C. §§ 153 (e), (g), 308 (c), 314 (Communications Act of 1934); 44 Stat. 568, 572, 573, as amended, 49 U. S. C. §§ 171, 176 (c), 179 (b) (Air Commerce Act of 1926); 52 Stat. 977, 49 U. S. C. § 401 (3), (21) (b), (29), (30) (Civil Aeronautics Act); 52 Stat. 998, 49 U. S. C. § 486 (same); 56 Stat. 182, 50 U. S. C. App. § 640 (Amendment of Nationality Act of 1940); 55 Stat. 206, 50 U. S. C. App. § 702 (Exportation Restriction Act); 56 Stat. 23, as amended, 50 U. S. C. App. § 901 (Emergency Price Control Act of 1942).

[12] The State Department's Legal Adviser, in a letter to the Attorney General dated January 30, 1948, wrote, in part, as follows:

"The Department regards as unfortunate the conclusion of the Court [of Appeals] that the U. S. exercises as complete control in the leased areas as in other areas long known as 'possessions' of the U. S., and its specific reference in this connection to the Philip-

The Canal Zone has been cited as a possession with which Bermuda is comparable. But the Isthmian Canal Convention of 1903, which ceded the Canal Zone to the United States, provides in Art. III that the United States is to have "all the rights, power and authority within the zone . . . which the United States would possess and exercise if it were the sovereign . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority." [13] Our State Department has firmly maintained that this treaty confers upon the United States complete power of commerce.[14] To such an extent, indeed, are we sovereign in the Canal Zone that Panama has been granted special commercial rights only by express and formal concession,[15] and this Court has reviewed the history of the acquisition and concluded that the title of the United States is complete and perfect. *Wilson* v. *Shaw,* 204 U. S. 24, at 32, 33.

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pine Islands, Swains Island, Samoa, Guam and the guano islands over all of which the U. S. exercises sovereignty, except the Philippines over which sovereignty was exercised until they were given their independence on July 4, 1946, and except the guano islands, over which, in general, the U. S. exercises exclusive jurisdiction and no other nation claims sovereignty.

"Any holding that the bases obtained from the Government of Great Britain on 99 year leases are 'possessions' of the United States in a political sense would not in the Department's view be calculated to improve our relations with that Government. Moreover, such a holding might very well be detrimental to our relations with other foreign countries in which military bases are now held or in which they might in the future be sought. . . ."

[13] 33 Stat. 2234, 2235.

[14] Secretary Hughes to the Panamanian Minister, Oct. 15, 1923, 2 Hackworth, *Digest of International Law,* pp. 801–805.

[15] Joint Statement of President Roosevelt and President Arias, Oct. 17, 1933, *id.,* 806 *et seq.;* General Treaty and Supplementary Conventions of March 2, 1936, ratified July 26, 1939, 53 Stat. 1807.

But the Panama Canal history may well be explanatory of a paragraph of the Bermudian lease from Great Britain, upon which the court below and respondent heavily rely and which this Court cites as one of the significant provisions. This clause provides that the "Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." From this provision it is sought to draw the conclusion that for all other purposes the area is part of the territory of the United States. The remaining provisions of the identical paragraph are sufficient to negative any idea that the territory becomes a United States possession.[16] But coastwise shipping privileges had been the subject of friction between the United States and Great Britain over the Panama Canal and the plain purport of the article is to say that we do not want to repeat that experience. The Panama Canal Act of 1912, 37 Stat. 560, 562, exempted American coastwise shipping from tolls, which the British Government represented to be a violation of the Hay-Pauncefote Treaty of 1901 and which it considered a corollary of the Clayton-Bulwer Treaty of 1850. President Wilson recommended that Congress repeal the exemption favoring American coastwise shipping as against British shipping [17] and the action

[16] The other subparagraphs provide that the United States must conform to the local system of lights and other navigation aids, and report in advance to local authorities any such devices established or changed; that the United States is exempt from local pilotage laws; that British commercial vessels may use the leased areas on the same basis as American commercial vessels; and that commercial United States aircraft cannot operate from the bases for other than military purposes except by agreement with the United Kingdom.

[17] President Wilson, in a message delivered in person to the Congress (51 Cong. Rec. 4313), said:

"Whatever may be our own differences of opinion concerning this

was taken only after a bitter and extensive debate.[18] I think that the clause, instead of being read to create a possession of the leased bases would, in the light of our tendency to favor our shipping, be more accurately read

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much debated measure, its meaning is not debated outside the United States. Everywhere else the language of the treaty [with Great Britain] is given but one interpretation, and that interpretation precludes the exemption I am asking you to repeal.

"We consented to the treaty [with Great Britain]; its language we accepted, if we did not originate; and we are too big, too powerful, too self-respecting a Nation to interpret with too strained or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please. The large thing to do is the only thing that we can afford to do, a voluntary withdrawal from a position everywhere questioned and misunderstood.

"We ought to reverse our action without raising the question whether we were right or wrong, and so once more deserve our reputation for generosity and for the redemption of every obligation without quibble or hesitation.

"I ask this of you in support of the foreign policy of the administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure."

[18] After hearings, the House Committee recommended passage. House Report No. 362, 63d Cong., 2d Sess. Three separate minority reports, reflecting the views of four Committee members, were filed. *Id.* The Senate Committee heard testimony covering more than one thousand pages. Hearings on H. R. 14385, Senate Committee on Interoceanic Canals, 63d Cong., 2d Sess. The issue was so explosive that the measure was reported back without recommendation. S. Rep. No. 469, 63d Cong., 2d Sess. The measure was debated for five days in the House, 51 Cong. Rec., Pt. 6, 5554–5602; 5605–5640; 5677–5767; 5797–5897; 5922–6089, and more than a month in the Senate, 51 Cong. Rec., Pt. 8, 7660–7667; 7723–7727; 8155–8172; 8211–8229; 8277–8284; 51 Cong. Rec., Pt. 9, 8335–8340; 8428–8446; 8493–8507; 8548–8560; 8638–8642; 8693–8707; 8730–8741; 8803–8824; 8867; 8875–8888; 8941–8956; 9003–9031; 9209–9214; 9215–9243; 9291–9297; 51 Cong. Rec., Pt. 10, 9355–9365; 9435–9446; 9509–9526; 9626–9631; 9713–9722; 9723–9745; 9784–9788; 9916–9929; 9977–10008; 10041–10086; 10127–10174; 10195–

to say "*even* for the purposes of coastwise shipping, the leased area shall not be considered a possession."

Guantanamo Naval Base, also referred to, is a leased base in Cuba upon which we have agreed that "no person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise." But Guantanamo has been ruled by the Attorney General not to be a possession;[19] it has not been listed by the State Department as among our "non-self-governing territories," [20] and the Administrator of the very Act before us has not listed it among our possessions.[21] Its treatment confirms our view that neither is Bermuda a possession.

Among responsible agencies of the United States, this Court alone insists that the Bermuda bases are possessions. The Department of Justice files a brief urging the Court against this position; the Department of State warns of its dangers and harmful effects upon our foreign relations; the Wage and Hour Administrator ruled administratively against coverage in Bermuda.[22] Congress

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10210; 10211–10248. See also Extension of Remarks at 51 Cong. Rec., Pt. 17, pp. 252–253; 253–255; 258–263; 266–270; 279–280; 280; 280–281; 281–282; 282–290; 290–292; 292–294; 295–296; 296–298; 298; 298–299; 299–303; 306–307; 307–309; 309–315; 316–319; 319–324; 324–331; 331–333; 333–334; 334–335; 335; 335–339; 339–340; 352–353; 353–356; 370–372; 418–428; 539–543; 610–617; 644–645; 645–646; 646–647; 650.

The repealer was passed as the Act of June 15, 1914, c. 106, 38 Stat. 385. See annotations in 48 U. S. C. A. §§ 1315, 1317.

[19] 35 Op. Atty. Gen. 536, 540–541.

[20] See *United Nations, Non-Self-Governing Territories, Summaries of Information Transmitted to the Secretary-General during 1946* (UN, 1947), p. 101.

[21] Wage & Hour Manual (1942 ed.) 30; 12 Fed. Reg. 4583–4584; 29 C. F. R. 1947 Supp., § 776.1.

[22] See note 21. See also Administrator's Letter dated May 22, 1942, stating that the Act does not apply to bases in the "British West Indies" and Deputy Administrator's Letter dated September 24, 1943, with specific reference to the leased area on Trinidad.

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has shown that it has not regarded the leased areas as "possessions." [23]

Heretofore it has been thought that the Court should follow rather than overrule the Executive department in matters of this kind.[24]

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[23] (a) In 1941 Congress sought to extend to the leased bases the provisions of the Longshoremen's and Harbor Workers' Compensation Act which covered death or disability from an injury occurring upon the navigable waters of the United States. The "United States" was therefore defined to mean "the several States and Territories and the District of Columbia, including the territorial waters thereof." 44 Stat. 1424, 33 U. S. C. § 902. The amendment, c. 357, 55 Stat. 622, made the Act applicable to injuries or death of covered employees at any military, air or naval base acquired after January 1, 1940, by the United States from any foreign government *or* any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands. This Act was amended in 1942, c. 668, 56 Stat. 1028, 1035, and, as amended, lists *separately* (1) bases acquired from foreign governments after January 1, 1940, and (2) lands used for military or naval purposes and any Territory or possession, including Alaska, the Philippines, Guantanamo, and the Canal Zone. It is clear that in neither 1941 nor 1942 did the Congress consider that the term "possession" alone would have extended coverage to the bases.

(b) The Act of March 27, 1942, c. 198, 56 Stat. 174, designed to extend War Damage protection provides that such protection shall be applicable only (1) to property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the territories and possessions of the United States, *and* in such other places as may be determined by the President to be under the dominion and control of the United States. The terms of this Act, and its legislative history, indicate that the final clause was added to cover areas such as these bases. If the Congress had considered areas of this kind to be "possessions" such a clause would scarcely have been necessary.

[24] More than 100 years ago, Mr. Chief Justice Marshall, speaking for a unanimous Court in *Foster* v. *Neilson*, 2 Pet. 253, 307–309, said: ". . . In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should

What I have said does not reflect the slightest doubt about the power of Congress to make government contractors, doing work in Bermuda or anywhere else in the world, whether in our own or in foreign possessions, pay time-and-a-half for overtime or to enforce almost any

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refuse to abide by the measures adopted by its own government. . . . The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. . . .

"After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. . . ."

In an earlier case, *The Amiable Isabella,* 6 Wheat. 1, 71, Mr. Justice Story had said: "In the first place, this Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. . . ."

If, as Mr. Chief Justice Marshall stated, this Court should not, to deny rights asserted by the Executive, place a different interpretation on an agreement with another nation, *a fortiori,* it should not do so in order to assert rights which not only are not asserted by our Executive or by the Congress, but are denied by them and by the other sovereign involved. And, to add, to the agreement under which we occupy the leased areas, that as a matter of law the bases have become our possessions, is certainly more than a trivial change in that agreement, in direct contravention of the caution by Mr. Justice Story.

labor policy upon them.[25] The power of Congress, by appropriate legislation, to govern such a relationship is not impaired if we hold that the place where the contract is performed is not our "possession." The holding that it is a possession is not essential to enable Congress to act but serves only the purpose of expanding the coverage of this Act to the bases without specific action by Congress. We need not resort to such an unwarranted and disturbing interpretation of our relations with Bermuda and the United Kingdom in order to preserve the full power of Congress to extend all proper protection to the wages and hours of all personnel at the base, because they are and can be there only by virtue of government assignment or government contracts.

In summary: Congress made the Act applicable in our "possessions." There is no indication or reason to believe that, had Congress considered the matter, it would have regarded our tenure in the Bermuda base as creating a "possession," or would have applied an Act regulating private employment to an area where no such private enterprise could exist. There is no indication of a purpose to apply the Act to an exclusively military operation; indeed the Act indicates the contrary by exempting government employees from its operation.[26]

It would not concern the United Kingdom, or the Colony of Bermuda, if the United States should require its contractors to pay overtime, upon any assumptions which do not imply a possession adverse to theirs. But I do think it will cause understandable anxiety if this Court does it by holding, as matter of law, that the leased areas are possessions of the United States, like those we

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[25] See, *e. g.*, the statutes mentioned in note 23.

[26] Section 3 (d) of the Act provides that the term "employer" shall not include the United States. 29 U. S. C. § 203 (d).

govern to the exclusion of all others. Such a decision by this Court initiates a philosophy of annexation and establishes a psychological accretion to our possessions at the expense of our lessors, not unlikely to be received in more critical quarters abroad as confirmation of the suspicion that commitments made by our Executive are lightly repudiated by another branch of our Government. It should be the scrupulous concern of every branch of our Government not to overreach any commitment or limitation to which any branch has agreed.[27]

I would reverse the judgment below and direct dismissal of the complaint.[28]

I am authorized to state that THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON join in this opinion.

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[27] See President Wilson's message quoted note 17; and see note 24.

[28] Since the District Court entered summary judgment before trial based on a ruling that the leased area is not a possession of the United States, I assume that this Court's affirmance of the reversal of that ruling leaves open on remand all other questions relevant to respondents' right of recovery, such as whether or not they were engaged in commerce or in the production of goods for commerce, as well as any defenses which may be available to petitioner.

UPSHAW *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 98. Argued November 12, 1948.—Decided December 13, 1948.

Arrested on suspicion without a warrant, petitioner confessed 30 hours later, while being held without having been taken before a committing magistrate as required by Rule 5 (a) of the Federal Rules of Criminal Procedure. The only reason given by the arresting officer for the delay in his arraignment was that there was not enough evidence to hold him and the police wished to question him further. At his trial in a federal court, the confession was admitted in evidence over his objection and the jury found that it was voluntary. *Held:* The confession was inadmissible and a conviction based thereon is reversed. *McNabb* v. *United States,* 318 U. S. 332, followed. *United States* v. *Mitchell,* 322 U. S. 65, distinguished. Pp. 410–414.

83 U. S. App. D. C. 207, 168 F. 2d 167, reversed.

Petitioner was convicted of grand larceny in a federal district court. The Court of Appeals affirmed. 83 U. S. App. D. C. 207, 168 F. 2d 167. This Court granted certiorari. 334 U. S. 842. *Reversed,* p. 414.

Joel D. Blackwell argued the cause for petitioner. With him on the brief was *James T. Wright.*

Robert S. Erdahl argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Beatrice Rosenberg.*

Mr. Justice Black delivered the opinion of the Court.

The petitioner was convicted of grand larceny in the United States District Court for the District of Columbia and sentenced to serve sixteen months to four years in prison. Pre-trial confessions of guilt without which peti-

tioner could not have been convicted [1] were admitted in evidence against his objection that they had been illegally obtained. The confessions had been made during a 30-hour period while petitioner was held a prisoner after the police had arrested him on suspicion and without a warrant.

Petitioner's objection to the admissibility of the confessions rested on Rule 5 (a) of the Federal Rules of Criminal Procedure and our holding in *McNabb* v. *United States,* 318 U. S. 332. Rule 5 (a) provides that "An officer making an arrest . . . shall take the arrested person without unnecessary delay before the nearest available" committing magistrate and when the arrested person appears before the magistrate "a complaint shall be filed forthwith." Petitioner contended that the officers had violated this rule in detaining him as they did without taking him before a committing magistrate. In the *McNabb* case we held that confessions had been improperly admitted where they were the plain result of holding and interrogating persons without carrying them "forthwith" before a committing magistrate as the law commands.

In this case the District Court thought that the *McNabb* ruling did not apply because the detention of petitioner "was not unreasonable under the circumstances as a matter of law." Consequently, that court held the confessions admissible. On appeal to the United States Court of Appeals for the District of Columbia, the United States Attorney and his assistants detailed the circumstances of petitioner's arrest and detention and

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[1] After the evidence was all in, the trial judge stated that without the confessions there was "nothing left in the case." The trial judge instructed the jury to acquit if they found that the petitioner had not confessed "voluntarily but because he was beaten." On this issue of physical violence the jury found against the petitioner, and therefore this issue is not involved in this case.

confessed error. They concluded from these detailed circumstances that the "delay" in carrying petitioner before a committing magistrate "was unreasonable and the purpose of it, as stated by the officers themselves, was only to furnish an opportunity for further interrogation." Under these circumstances, the district attorney thought that the *McNabb* rule made the confessions inadmissible without regard to whether they were "voluntary" in the legal sense. The delay in taking petitioner before a judicial officer was thought, in the words of the district attorney, to have been "for purposes inimical to the letter and spirit of the rule requiring prompt arraignment."

The Court of Appeals rejected this confession of error, one judge dissenting. 83 U. S. App. D. C. 207, 168 F. 2d 167. It read the *McNabb* case as explained in *United States* v. *Mitchell,* 322 U. S. 65, as holding that "A confession voluntarily given is admissible in evidence" while conversely "a confession involuntarily made is inadmissible." 83 U. S. App. D. C. 207, 168 F. 2d 167. That court thought the *McNabb* case did no more than extend the meaning of "involuntary" confessions to proscribe confessions induced by psychological coercion as well as those brought about by physical brutality. Finding no psychological coercion in the facts of this case, the court concluded that the confessions were not the "fruit of the illegal detention." The court also laid stress on the fact that the petitioner's detention unlike McNabb's, "was not aggravated by continuous questioning for many hours by numerous officers."

We hold that this case falls squarely within the *McNabb* ruling and is not taken out of it by what was decided in the *Mitchell* case. In the *McNabb* case we held that the plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to "secret interrogation of persons accused of crime." We then

pointed out the circumstances under which petitioners were interrogated and confessed. This was done to show that the record left no doubt that the McNabbs were not promptly taken before a judicial officer as the law required, but instead were held for secret questioning, and "that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made." The McNabb confessions were thus held inadmissible because the McNabbs were questioned while held in "plain disregard of the duty enjoined by Congress upon federal law officers" promptly to take them before a judicial officer. In the *McNabb* case there were confessions "induced by illegal detention," *United States* v. *Mitchell, supra* at 70, a fact which this Court found did not exist in the *Mitchell* case.

In the *Mitchell* case although the defendant was illegally held eight days, the court accepted the record as showing that Mitchell promptly and spontaneously admitted his guilt within a few minutes after his arrival at the police station. Mitchell's confessions therefore were found to have been made before any illegal detention had occurred. This Court then stated in the *Mitchell* opinion that "the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures." Thus the holding in the *Mitchell* case was only that Mitchell's subsequent illegal detention did not render inadmissible his prior confessions. They were held not to involve "use by the Government of the fruits of wrongdoing by its officers." The *Mitchell* case at p. 68, however, reaffirms the *McNabb* rule that a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the "confession is the result of torture, physical or psychological . . . ."

In this case we are left in no doubt as to why this petitioner was not brought promptly before a committing magistrate. The arresting officer himself stated that petitioner was not carried before a magistrate on Friday or Saturday morning after his arrest on Friday at 2 a. m., because the officer thought there was not "a sufficient case" for the court to hold him, adding that even "if the Police Court did hold him we would lose custody of him and I no longer would be able to question him." Thus the arresting officer in effect conceded that the confessions here were "the fruits of wrongdoing" by the police officers. He conceded more: He admitted that petitioner was illegally detained for at least thirty hours for the very purpose of securing these challenged confessions. He thereby refutes any possibility of an argument that after arrest he was carried before a magistrate "without unnecessary delay."

The argument was made to the trial court that this method of arresting, holding, and questioning people on mere suspicion was in accordance with the "usual police procedure of questioning a suspect . . . ." However usual this practice, it is in violation of law, and confessions thus obtained are inadmissible under the *McNabb* rule. We adhere to that rule.[2]

Reversed.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE, MR. JUSTICE JACKSON and MR. JUSTICE BURTON join, dissenting.

When not inconsistent with a statute, or the Constitution, there is no doubt of the power of this Court to institute, on its own initiative, reforms in the federal practice

[2] Our holding is not placed on constitutional grounds. Since the *McNabb* rule bars admission of confessions we need not and do not consider whether their admission was a violation of any of the provisions of the Fifth Amendment.

as to the admissibility of evidence in criminal trials in federal courts.[1] This power of reform, which existed at the time, March 1, 1943, *McNabb* v. *United States,* 318 U. S. 332, was decided, is not, I believe, restricted by the language of Rule 26 of the Federal Rules of Criminal Procedure, effective March 21, 1946. Federal Rule of Criminal Procedure No. 59; 91 Cong. Rec. 12,545. The admissibility of evidence, like the competency of witnesses, is "governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience." *Wolfle* v. *United States,* 291 U. S. 7, 12.[2] While judicial innovations explicitly expanding or contracting admissibility of evidence are rare,

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[1] 54 Stat. 688, 18 U. S. C. § 687.

Rules of Criminal Procedure for the District Courts of the United States, together with Notes to the Rules, 79th Cong., 2d Sess., S. Doc. No. 175.

No change was made in the law by P. L. 772, 80th Cong., effective September 1, 1948, § 20, 62 Stat. 683, 862. 18 U. S. C. § 595 is not in effect but has been superseded by Rule 5 (a) of the Rules of Criminal Procedure for the District Courts of the United States:

"5 (a) APPEARANCE BEFORE THE COMMISSIONER. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

[2] *Funk* v. *United States,* 290 U. S. 371, 383:

"The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced."

there have been sufficient occasions to establish by precedent and legislative acceptance that the power exists. *McNabb* v. *United States, supra,* 341.[3]

Such power should be used to change the established rules of evidence, however, only when "fundamentally altered conditions," note 2, *supra,* call for such a change in the interests of justice. Otherwise the bad results from a change of well-established rules are quite likely to outweigh the good. The lack of any necessity for changing the rules of evidence to protect an accused led me to dissent in the *McNabb* case, a murder case where an assumed failure to commit the prisoners apparently was relied upon as a partial basis for denying admissibility to certain confessions.

My objection to this Court's action of today in what seems to me an extension of the scope of nonadmissibility of confessions in the federal courts is not to its power so to act but to the advisability of such an additional step. Unless Congress or a majority of this Court modifies the *McNabb* rule, I feel bound to follow my understanding of its meaning in similar cases that may arise, but that duty does not impose upon me the obligation to accept this ruling as to Upshaw which seems to me to compound certain unfortunate results of the *McNabb* decision by extending it to circumstances beyond the scope of the *McNabb* ruling. This attitude leads me (I) to analyze the *McNabb* case and its offspring, (II) to point out why I think the present decision goes beyond the holding in *McNabb* and (III) to point out why *McNabb* should not be extended.

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[3] Of the cases cited, only *United States* v. *Wood,* 14 Pet. 430, and *Funk* v. *United States,* 290 U. S. 371, involve a change by this Court of a rule of evidence which had become firmly entrenched in our federal jurisprudence. The other cases involve a choice between conflicting rules or the establishment of a rule where none had theretofore existed.

The judicial approach to the problem, of course, must be in a spirit of cooperation with the police officials in the administration of justice. They are directly charged with the responsibility for the maintenance of law and order and are under the same obligation as the judicial arm to discharge their duties in a manner consistent with the Constitution and statutes. The prevention and punishment of crime is a difficult and dangerous task, for the most part performed by security and prosecuting personnel in a spirit of public service to the community. Only by the maintenance of order may the rights of the criminal and the law-abiding elements of the population be protected. As has been pointed out by this Court in the *McNabb* and *Mitchell* cases, *United States* v. *Mitchell,* 322 U. S. 65, there is no constitutional problem involved in deciding whether a voluntary confession given by a prisoner prior to commitment by a magistrate should be admitted in evidence. A prisoner's constitutional rights against self-incrimination or to due process are protected by the rule that no involuntary confession may be admitted. *McNabb* v. *United States, supra,* pp. 339–40 and cases cited; *Haley* v. *Ohio,* 332 U. S. 596; *Malinski* v. *New York,* 324 U. S. 401; *Ashcraft* v. *Tennessee,* 322 U. S. 143.

I.

Our first inquiry, then, is as to the legal doctrine behind the *McNabb* decision.

A. Were the McNabb confessions barred as a punishment or penalty against the police officers because they were thought to have disobeyed the command of a statute?

B. Were they barred because unlawful imprisonment is so apt to be followed by an involuntary confession as to justify the exclusion of all confessions received before judicial commitment after a prisoner is kept in custody

more than a reasonable time without being taken before a committing magistrate?

C. Were they barred because the particular circumstances under which the confessions were made were so likely to produce involuntary confessions as to justify exclusion?

A. As the *McNabb* decision was a sudden departure from the former federal rule as to the admissibility of confessions [4] initiated by the Court, without the benefit of brief or argument and without knowledge of the actual facts as to commitment,[5] it can hardly be expected that

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[4] 318 U. S. 338–39:

". . . Relying upon the guarantees of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law,' the petitioners contend that the Constitution itself forbade the use of this evidence against them. The Government counters by urging that the Constitution proscribes only 'involuntary' confessions, and that judged by appropriate criteria of 'voluntariness' the petitioners' admissions were voluntary and hence admissible."

The Court was establishing what it thought were "civilized standards of procedure and evidence." P. 340.

[5] As no question was raised by the defendants in the *McNabb* case because of prolonged police detention before commitment, the record did not show when they were committed. Dissent *McNabb* v. *United States* at p. 349. The Court assumed that detention without commitment lasted for Freeman and Raymond McNabb from between one and two o'clock Thursday morning, when they were arrested twelve miles from Chattanooga, until the completion of the questioning about two o'clock Saturday morning, forty-eight hours later. One cannot tell from the opinion when Freeman and Raymond confessed or to what. A third McNabb, Benjamin, was not taken into custody until between eight and nine o'clock Friday morning. He confessed after five or six hours. The Court assumed that he had not been committed prior to confession. *McNabb* v. *United States, supra,* pp. 334–38.

So far as the ruling in the *McNabb* case is concerned, the Court's understanding of the facts, as stated in the opinion, is the basis for the decision. Apparently Freeman and Raymond were by 10:30

it could have the desirable explicitness of a trite rule of evidence. Consequently confusion immediately arose as to its meaning. The dissent interpreted the opinion as a direction to exclude the confessions "because in addition to questioning the petitioners, the arresting officers failed promptly to take them before a committing magistrate." It concluded: "The officers of the Alcohol Tax Unit should not be disciplined by overturning this conviction." *McNabb* v. *United States, supra,* p. 349. Some courts thought that any confession obtained before commitment was inadmissible. *United States* v. *Hoffman,* 137 F. 2d 416, 421; *Mitchell* v. *United States,* 78 U. S. App. D. C. 171, 172, 138 F. 2d 426, 427. Others have understood the case to determine admissibility of confessions by a coercion test.[6] Varying impressions as to the rule that the *McNabb* case announced appear in the cases.[7] The Spe-

a. m. of the morning of their arrest committed for operating an illicit still, another crime than, though connected with, the murder for which they were convicted. Benjamin was committed for murder within four hours of his surrender. Petition for Rehearing, pp. 3–5.

See new trial, *McNabb* v. *United States,* 142 F. 2d 904. This commitment for a different crime was a sufficient compliance with the commitment statute to justify the admission of the confessions in the second McNabb trial, in the view of the Circuit Court of Appeals for the Sixth Circuit.

[6] *Brinegar* v. *United States,* 165 F. 2d 512, 515; *Ruhl* v. *United States,* 148 F. 2d 173, 175; *Paddy* v. *United States,* 143 F. 2d 847, 852; *United States* v. *Grote,* 140 F. 2d 413, 414–15; *United States* v. *Klee,* 50 F. Supp. 679.

[7] The following statements have been made concerning *McNabb:* "The court then held the confessions obtained by third degree methods were inadmissible . . . ." *State* v. *Behler,* 65 Idaho 464, 469, 146 P. 2d 338, 340. "The courts are not concerned with the practices of the police except in so far as they may be asked to use evidence thereby obtained against the will of the accused." *People* v. *Fox,* 148 P. 2d 424, 431 (Calif.). ". . . the new doctrine of constitutional rights under the due process clause announced by the Supreme Court of the United States in *McNabb* v. *United States* . . . ." *Thompson*

cial Committee on the Bill of Rights of the American Bar Association under date of May 15, 1944, advised Subcommittee No. 2 of the Committee on the Judiciary of the House of Representatives that before the *McNabb* case "there was no effective penalty in operation. . . .

> "Then came the McNabb case which did impose a drastic penalty. The seven majority Justices held that unlawful detention shut out the confession. The decision made the speedy production statutes really mean something. The police were no longer left free to enforce the law by disobeying the law." P. v.

Five members of the Special Committee, apparently under the Chairmanship of Professor Zechariah Chafee, Jr., also submitted a Memorandum which said, "The McNabb rule excluding confessions obtained during unlawful detention is an effective penalty for violation of the Acts of Congress." P. 19. It added:

> "Congress should be very reluctant to take away the only effective penalty now existing for violation of the fundamental right to have the continuance of custody determined by a magistrate and not by the uncontrolled will of the police, however able and devoted they may be." P. 25.[8]

Notwithstanding that some did gain the impression from the *McNabb* case that it was intended as a discipline of police officers for the violation of the commitment stat-

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v. *Harris*, 107 Utah 99, 112, 152 P. 2d 91, 97. To the same effect are *Cavazos* v. *State*, 146 Tex. Cr. Rep. 144, 149, 172 S. W. 2d 348, 351, *People* v. *Goldblatt*, 383 Ill. 176, 188, 49 N. E. 2d 36, 41; Royse, J., dissenting, in *Scoopmire* v. *Taflinger*, 114 Ind. App. 419, 434, 52 N. E. 2d 728, 733.

[8] See also the statement of Hon. Francis Biddle, Attorney General, Hearings before Subcommittee No. 2 of the Committee of the Judiciary, House of Representatives, 78th Cong., 1st Sess., on H. R. 3690, p. 27.

utes, a reading of *McNabb* as later explained by *United States* v. *Mitchell, supra,* negatives such a conclusion.

It is true that there are phrases in the *McNabb* opinion that condemn the assumed failure to take the accused promptly before a magistrate.[9] Further Benjamin's confession was barred even though it was given within "five or six hours" of questioning, and without the slightest suggestion of force, after his voluntary surrender because he had heard the officers were looking for him. Perhaps the strongest indication that the *McNabb* decision may have been intended as a penalty for police misconduct occurs in another case decided the same day as *McNabb, Anderson* v. *United States,* 318 U. S. 350. There a man was arrested Sunday night and confessed after two hours' questioning on Monday morning. Nevertheless his confession was held inadmissible under authority of *McNabb.* P. 355.

However, *United States* v. *Mitchell, supra,* made it clear that the purpose of *McNabb* was not to enforce a penalty for police misconduct.[10] In the *Mitchell* case a suspect was arrested and taken to the police station. He confessed within a few minutes of his arrival. He was illegally detained for eight days before being taken before a committing magistrate. "The police explanation of this illegality is that Mitchell was kept in such

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[9] *E. g.:* "For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding." Pp. 341–42. "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. . . . Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic." P. 343.

[10] See The *NcNabb* Rule Transformed, 47 Col. L. Rev. 1214.

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custody without protest through a desire to aid the police in clearing up thirty housebreakings . . . ." This Court then pronounced this statement as to the exclusion of the confessions as evidence, "These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct." Pp. 70–71. The *Mitchell* explanation of *McNabb* seems correct. It is not the function of courts to provide penalties and sanctions for acts forbidden by statutes where neither statutes nor the common law nor equity procedure have established them.

For the above reasons, I reach the conclusion that the *McNabb* case was not intended as a penalty or sanction for violation of the commitment statute.

B. The Court bases its decision of today on the theory that "a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological . . . .'" The Court holds that this was the *McNabb* rule and adheres to it. I do not think this was the *McNabb* rule and I do think the rule as now stated is an unwarranted extension of the rule taught by the *McNabb* case. My reasons follow.

There is no legal theory expressed in *McNabb* that supports the idea that every confession after unnecessary delay and before commitment is inadmissible. There are a few isolated sentences that do lend credence to such an explanation of the legal theory behind the case, but when read in context, I think it is clear that they do

not expound such a rule.[11] The physical conditions of the restraint are emphasized, pp. 335–38 and 344–45. Attention is called to the examination, when stripped, of one man. P. 337.[12] The *Mitchell* case, *supra,* p. 67, removes all my doubts as to the true *McNabb* rule. It says: "Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case which led us to rule that a conviction on such evidence could not stand." [13]

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[11] Cf.: "For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them." Pp. 341–42. "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." P. 345. "And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." P. 347. On the other hand, there are repeated expressions such as "the evidence elicited . . . in the circumstances disclosed here," p. 341; "evidence secured under the circumstances revealed here," p. 347, which point the other way.

[12] Apparently such an examination is considered effective coercion. See *Malinski* v. *New York,* 324 U. S. 401.

[13] See also the statement in *Haley* v. *Ohio,* 332 U. S. 596, 606: "Legislation throughout the country reflects a similar belief that detention for purposes of eliciting confessions through secret, persistent, long-continued interrogation violates sentiments deeply embedded in the feelings of our people. See *McNabb* v. *United States,* 318 U. S. 332, 342–43."

In discussing the effect of the *Mitchell* case, a note in 38 Journal of Criminal Law and Criminology 136, says at p. 137: "There the Court phrased the rule of the *McNabb* case to stand for the proposition that the illegal detention of an accused person will invalidate his confession only when the detention itself acts as an inducement in the procuring of the confession."

During detention in violation of the federal commitment statute is the likelihood that police officials will use coercion for the extraction of an involuntary confession so strong as to justify the exclusion by this Court of all confessions to the police obtained after their failure to conform to the requirement of prompt production of the accused before a magistrate? I think not. It must be admitted that a prompt hearing gives an accused an opportunity to obtain a lawyer; [14] to secure from him advice as to maintaining an absolute silence to all questions, no matter how apparently innocuous; to gain complete freedom from police interrogation in all bailable offenses; [15] and that these privileges are more valuable to the illiterate and inexperienced than to the educated and well-briefed accused. Proper protection of the ignorant is of course desirable, but the rule now announced forces exclusion of all confessions given during illegal restraint. It will shift the inquiry to the legality of the arrest and restraint, rather than to whether the confession was voluntary. Such exclusion becomes automatic on proof of detention in violation of the commitment statute, followed by a confession to police officials before commitment. It is now made analogous to the exclusion of evidence obtained in violation of the Bill of Rights through unreasonable search and seizure or through compulsion or by denial of due process. I do not think this is the doctrine of the *McNabb* case or that it should now be made an explicit rule of federal law.

The rule as to the inadmissibility of evidence in federal courts obtained in violation of the Bill of Rights, Fourth and Fifth Amendments is, it seems to me, inapplicable

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[14] Rules of Criminal Procedure, Nos. 5 (b) and 44.

[15] 18 U. S. C. §§ 3041, 3141; Rules of Criminal Procedure, No. 46 (a) (1).

as an analogy to a situation such as existed in the *McNabb* case and here.[16] By assumption of this Court, in the *McNabb* case the McNabb confessions were obtained without "disregard of liberties deemed fundamental by the Constitution," *McNabb* v. *United States, supra,* 339, *i. e.,* without violation of the Bill of Rights. I take it the same assumption applies as to Upshaw. Under this assumption, the McNabb confessions would have been admissible if the Court had not believed there was a failure to follow the statute on commitments. Confessions, of course, are also inadmissible when coerced in violation of constitutional due process under the Fourteenth Amendment. *Malinski* v. *New York,* 324 U. S. 401, 404; *Haley* v. *Ohio,* 332 U. S. 596. When other evidence is the direct result of an unconstitutional act such as a violation of the Fourth Amendment, this Court has said, in federal cases, that to permit its use would impair the protection of this major guaranty of a free

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[16] Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

See *Weeks* v. *United States,* 232 U. S. 383; *Boyd* v. *United States,* 116 U. S. 616; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298; *Harris* v. *United States,* 331 U. S. 145, 150.

country.[17] When, as in the *McNabb* case, there are confessions after failure to observe statutory directions not shown to have coerced the confessions the rule as to evidence extracted in defiance of the Constitution does not apply.[18]

[17] *Weeks* v. *United States*, 232 U. S. 383, 393: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

[18] Compare the statement of Chief Justice Taft:

"Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.

"A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it." *Olmstead* v. *United States*, 277 U. S. 438, 468.

This Court by decision has excluded evidence obtained by unreasonable search and seizure under the Fourth Amendment or by coercion to a degree that violates the Fifth or the Fourteenth Amendments because the admission of such evidence would imperil the efficacy of those constitutional rights. If confessions obtained during unlawful detention are not excluded by the fact of unlawful detention alone, the constitutionally guaranteed rights of the accused are nevertheless protected by the rule that no involuntary confession is admissible. It is therefore unnecessary for constitutional reasons to extend this protection to evidence obtained through violation of a statute or a rule of criminal procedure by those to whom the confession is made. In criminal trials, the method of obtaining evidence has never been a reason for barring its use except where constitutional rights were violated.[19] The prohibition of wiretapping in § 605 of the Federal Communications Act is not the basis for the exclusion in prosecutions of evidence so obtained. The exclusion of such evidence is based on an explicit direction of the section that information so obtained should not be divulged.[20] Congress could, of course, pass such a statute to prohibit the use of a confession as evidence, if obtained during an unlawful detention. The rule of the *Olmstead*

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[19] *E. g., Proceedings Against Bishop Atterbury,* 16 How. St. Tr. 323, 495, 629–30 (1723); *Sylvester Thornton's Case,* 1 Lewin C. C. 49 (1824); *Rex* v. *Derrington,* 2 C. & P. 418 (1826); *Reg.* v. *Granatelli,* 7 State Tr. N. S. 979, 987 (1849); *Hart* v. *United States,* 76 U. S. App. D. C. 193, 130 F. 2d 456 (C. A. D. C. 1942).

"It is necessary in this connection to distinguish between evidence illegally procured and evidence procured by unconstitutional search and seizure." *Hart* v. *United States, supra,* at p. 459.

The English exception to this rule for confessions obtained by police questioning was rejected by this Court, after careful consideration, in *Bram* v. *United States,* 168 U. S. 532, 556–58.

[20] *Nardone* v. *United States,* 302 U. S. 379, 382; *Goldstein* v. *United States,* 316 U. S. 114, 118.

case, 277 U. S. 438, 466, derived from the common law that the admissibility of evidence is not affected by conduct of investigators where there is no violation of a constitutional guaranty, stands unimpaired.

If this judicial rule of exclusion of all confessions secured after illegal detention is adhered to, it must mean that this Court thinks illegal detention is so likely to result in "third degree" that it should be outlawed *per se.* There is a reference to "third degree" in *McNabb,* p. 344, but, as indicated above, p. 425, no reliance upon the detention as coercive in the due process sense.[21] If illegal detention, *per se,* is believed sufficiently likely to produce a coerced confession as to justify exclusion of such confessions as evidence, it does not require this extension of the *McNabb* rule to make such evidence inadmissible. A court never knows whether a confession is or is not voluntary. It bars confessions on uncontroverted proof of facts which as a matter of law are deemed so coercive as to be likely to produce an involuntary confession. *Chambers* v. *Florida,* 309 U. S. 227, 238–39; *Malinski* v. *New York,* 324 U. S. 401, 404. If illegal detention alone were deemed that coercive, the confessions would be barred as a matter of due process in both state and federal courts.[22] So here if illegal detention alone is the decisive

[21] Others have viewed the exclusion of confessions in the *McNabb* case as based on their extraction by near third-degree measures. Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 78th Cong., 1st Sess., on H. R. 3690, p. 92:

"The McNabb decision does not even prevent the use of the man's own confession against him. What it does do is prevent the use against him of a confession obtained by third degree means or by means akin to third degree in the form of the secret detention and failure to bring him promptly to the committing officer."

[22] Cf. *Haley* v. *Ohio,* 332 U. S. 596, 599, where this Court said in stronger language than it had ever used before, "If the undisputed evidence suggests that force or coercion was used to exact the con-

factor, the rule of exclusion surely will apply to both state and federal trials as violative of the Due Process Clause. But the *McNabb* rule does not apply to trials in state courts.[23] It is because illegal detention was not thought to be *per se* coercive that it was necessary to create the *McNabb* rule of exclusion.

For the foregoing reasons, I conclude that detention alone, even for the purpose of obtaining information, should not be sufficient to justify the exclusion of a confession to police officers obtained after unnecessary delay and before commitment.

C. This brings me to a statement of the true rule of the *McNabb* case, as I understand it. This rule is that purposeful, unlawful detention illegally to extract evidence and the successful extraction of confessions under psychological pressure, other than mere detention for limited periods, makes confessions so obtained inadmissible. This statement is a paraphrase of the *Mitchell* interpretation referred to in the preceding subdivision. It means that pressure short of coercion but beyond mere detention makes confessions inadmissible. Obviously there is a wide range of discretion as to how much psychological pressure is necessary. If any material amount is sufficient, the rule differs little from one denying admissibility if obtained during illegal restraint. If almost coercion is required, the rule will differ little from that excluding an involuntary confession. Under this interpretation of *McNabb,* I suppose, as in coerced confessions, it should be left to a jury to decide whether there was enough evidence of pressure where the admitted facts do not show improper pressure as a matter of law.

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fession, we will not permit the judgment of conviction to stand, even though without the confession there might have been sufficient evidence for submission to the jury."

[23] *Townsend* v. *Burke,* 334 U. S. 736, 738.

II.

The Court now says that illegal detention alone is sufficient to bar from evidence a confession to the police during that unlawful detention. As I think this is an improper extension of the *McNabb* rule, I proceed to state the application of the *McNabb* rule, as I understand it, to Upshaw's situation. Perhaps Upshaw's arrest without a warrant was also without reasonable cause on the part of the arresting officer to believe he had committed a felony. This unlawful arrest is not relied upon in the opinion. So far as the admissibility of the confession is concerned, it makes no difference that it may have been obtained as the result of an illegal arrest or an unlawful detention. I think there was less psychological pressure upon Upshaw than there was upon the McNabbs. That precedent, therefore, if the true *McNabb* rule is properly stated in Part I, subdivision C, above, does not require me to declare Upshaw's confession inadmissible. In the McNabbs' case, the facts of their illegal detention that caused this Court's action appear from the opinion as set out below.[24] As for Upshaw the facts are detailed in the foot-

[24] 318 U. S. at 334–38:

"Immediately upon arrest, Freeman, Raymond, and Emuil were taken directly to the Federal Building at Chattanooga. They were not brought before a United States commissioner or a judge. Instead, they were placed in a detention room (where there was nothing they could sit or lie down on, except the floor), and kept there for about fourteen hours, from three o'clock Thursday morning until five o'clock that afternoon. They were given some sandwiches. They were not permitted to see relatives and friends who attempted to visit them. They had no lawyer. There is no evidence that they requested the assistance of counsel, or that they were told that they were entitled to such assistance.

"Barney McNabb, who had been arrested early Thursday morning by the local police, was handed over to the federal authorities about nine or ten o'clock that morning. He was twenty-eight years old; like the other McNabbs he had spent his entire life in the Settlement,

Footnote 24—Continued.

had never gone beyond Jasper, and his schooling stopped at the third grade. Barney was placed in a separate room in the Federal Building where he was questioned for a short period. The officers then took him to the scene of the killing, brought him back to the Federal Building, questioned him further for about an hour, and finally removed him to the county jail three blocks away.

"In the meantime, direction of the investigation had been assumed by H. B. Taylor, district supervisor of the Alcohol Tax Unit, with headquarters at Louisville, Kentucky. Taylor was the Government's chief witness on the central issue of the admissibility of the statements made by the McNabbs. Arriving in Chattanooga early Thursday morning, he spent the day in study of the case before beginning his interrogation of the prisoners. Freeman, Raymond, and Emuil, who had been taken to the county jail about five o'clock Thursday afternoon, were brought back to the Federal Building early that evening. According to Taylor, his questioning of them began at nine o'clock. Other officers set the hour earlier.

"Throughout the questioning, most of which was done by Taylor, at least six officers were present. At no time during its course was a lawyer or any relative or friend of the defendants present. Taylor began by telling 'each of them before they were questioned that we were Government officers, what we were investigating, and advised them that they did not have to make a statement, that they need not fear force, and that any statement made by them would be used against them, and that they need not answer any questions asked unless they desired to do so.'

"The men were questioned singly and together. As described by one of the officers, 'They would be brought in, be questioned possibly at various times, some of them half an hour, or maybe an hour, or maybe two hours.' Taylor testified that the questioning continued until one o'clock in the morning, when the defendants were taken back to the county jail.

"The questioning was resumed Friday morning, probably sometime between nine and ten o'clock. 'They were brought down from the jail several times, how many I don't know. They were questioned one at a time, as we would finish one he would be sent back and we would try to reconcile the facts they told, connect up the statements they made, and then we would get two of them together. I think at one time we probably had all five together trying to reconcile their statements . . . When I knew the truth I told the defendants

Footnote 24—Continued.

what I knew. I never called them damned liars, but I did say they were lying to me. . . . It would be impossible to tell all the motions I made with my hands during the two days of questioning, however, I didn't threaten anyone. None of the officers were prejudiced towards these defendants nor bitter toward them. We were only trying to find out who killed our fellow officer.'

"Benjamin McNabb, the third of the petitioners, came to the office of the Alcohol Tax Unit about eight or nine o'clock Friday morning and voluntarily surrendered. Benjamin was twenty years old, had never been arrested before, had lived in the McNabb Settlement all his life, and had not got beyond the fourth grade in school. He told the officers that he had heard that they were looking for him but that he was entirely innocent of any connection with the crime. The officers made him take his clothes off for a few minutes because, so he testified, 'they wanted to look at me. This scared me pretty much.' He was not taken before a United States Commissioner or a judge. Instead, the officers questioned him for about five or six hours. When finally in the afternoon he was confronted with the statement that the others accused him of having fired both shots, Benjamin said, 'If they are going to accuse me of that, I will tell the whole truth; you may get your pencil and paper and write it down.' He then confessed that he had fired the first shot, but denied that he had also fired the second.

"Because there were 'certain discrepancies in their stories, and we were anxious to straighten them out,' the defendants were brought to the Federal Building from the jail between nine and ten o'clock Friday night. They were again questioned, sometimes separately, sometimes together. Taylor testified that 'We had Freeman McNabb on the night of the second [Friday] for about three and one-half hours. I don't remember the time but I remember him particularly because he certainly was hard to get anything out of. He would admit he lied before, and then tell it all over again. I knew some of the things about the whole truth and it took about three and one-half hours before he would say it was the truth, and I finally got him to tell a story which he said was true and which certainly fit better with the physical facts and circumstances than any other story he had told. It took me three and one-half hours to get a story that was satisfactory or that I believed was nearer the truth than when we started.'

"The questioning of the defendants continued until about two o'clock Saturday morning, when the officers finally 'got all the dis-

note.[25] The time between confession and commitment is not significant. *United States* v. *Mitchell, supra.* The indications of pressure on the McNabbs that lead me to

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crepancies straightened out.' Benjamin did not change his story that he had fired only the first shot. Freeman and Raymond admitted that they were present when the shooting occurred, but denied Benjamin's charge that they had urged him to shoot. Barney and Emuil, who were acquitted at the direction of the trial court, made no incriminating admissions." [Footnotes omitted.]

In appraising the severity of the McNabb pressure for confessions in comparison with that exerted in the Upshaw detention, it should also be borne in mind that in the *Anderson* case, 318 U. S. at 355, a confession was excluded that resulted from two hours' questioning. I have no explanation for this exclusion. If it was intended to make two hours' questioning a bar to a confession, the later *Mitchell* case is inconsistent with such a conclusion. See the quotation preceding note 13, *supra.* The opinion does not rely upon it and it seems to me obviously within permissible limits unless we are to use the penalty theory. See p. 421, *supra.*

[25] Upshaw, a Negro man able to read and write who had completed one year of high school, was arrested at his room by Detectives Furr and Culpepper on a charge of larceny of a wrist watch at about 2 a. m., Friday, June 6. He was taken to No. 10 precinct and questioned for about 30 minutes. Furr testified that petitioner was under the influence of alcohol at the time. Upshaw denied this. He was coughing sporadically at the time of his arrest and subsequently until his commitment. At approximately 10 a. m., June 6, he was questioned again by Furr, at which time he denied guilt. Culpepper questioned him through the bars in the cell block at 11 a. m. and again at 5:30 p. m. on June 6. Furr questioned him again for approximately 30 minutes at 7:30 p. m. on the same day. At 9 a. m., June 7, Upshaw confessed, and at 9:30 a. m. he signed a statement which he identified as his statement at 2 p. m., June 7. Thus some 31 hours intervened between the arrest and the confession. At 9 p. m. that night Upshaw was taken to the home of the complaining witness where he repeated his confession to her.

The petitioner was taken before a magistrate for commitment on Monday, June 9. The officers testified that they had not had him committed sooner because they did not have a sufficient case against him to cause the Police Court to hold him and because they wanted to continue their investigation.

conclude that the Court should hold Upshaw's confession admissible under my understanding of the *McNabb* rule before this present holding are the lack of experience of the McNabbs, the "breaking" of Benjamin by confrontation of charges of his guilt by his relatives and confederates, the greater number of officers questioning them, and the longer time the McNabb group was interrogated.[26]

III.

I do not agree that we should now extend the *McNabb* rule by saying that every confession obtained by police after unnecessary delay in arraignment for commitment and before magisterial commitment must be barred from the trial. Those most concerned with a proper administration of the criminal law are against any extension.

(1) The departure of the *McNabb* and *Anderson* cases from well-established methods for protection against coercion has been condemned by the House of Representatives and not acted upon by the Senate.[27]

(2) Officers charged with enforcement of the criminal law have objected for the reason that fear of the application of its drastic penalties deterred officers from questioning during reasonable delays in commitment.[28]

(3) State courts under similar laws and conditions have refused to follow the *McNabb* example.[29]

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[26] See 47 Col. L. Rev. 1214, 1217, The *McNabb* Rule Transformed.

[27] 93 Cong. Rec. 1392; H. R. Rep. No. 29, 80th Cong., 1st Sess.

[28] International Association of Chiefs of Police, Hearings, *supra*, 43; National Sheriffs' Association, Hearings, *supra*, 26; Attorney General of the United States, H. R. Rep. No. 29, *supra*.

[29] *Fry* v. *State*, 78 Okla. Cr. 299, 313, 147 P. 2d 803, 810–11; *State* v. *Folkes*, 174 Ore. 568, 588, 150 P. 2d 17, 25; *State* v. *Smith*, 158 Kan. 645, 651, 149 P. 2d 600, 604; *People* v. *Malinski*, 292 N. Y. 360, 370–372, 387, 55 N. E. 2d 353, 357, 365; *State* v. *Collett*, 58 N. E. 2d 417, 426–27 (Ohio); *State* v. *Nagel*, 75 N. D. 495, 28 N. W. 2d 665,

(4) Law Review comment generally condemns the rule.[30]

In the Federal Rules of Criminal Procedure, Preliminary Draft, submitted May 3, 1943, to this Court, there was included a § 5 (b) which purported to codify the *McNabb* rule.[31] In response to widespread opposition to such a codification,[32] this section of Rule 5 was omitted from the final draft. These rules were drawn by a representative committee of the bench and bar with wide participation beyond the membership by interested parties from both groups. They were transmitted on December 26, 1944, by this Court to the Attorney General to be reported to Congress, more than a year after the *McNabb* case and after the hearings on the House bill to nullify the *McNabb* rule. Neither this Court nor the Congress restored the rejected proposal.

Instead of an extension of the *McNabb* rule, I feel that it should be left, as I think it originally was, a rule that barred a confession extracted under psychological pressure of the degree used in the *McNabb* case.

Such condemnation of even the restricted *McNabb* rule by those immediately responsible for the enactment and

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679; *State* v. *Ellis,* 354 Mo. 998, 1005, 193 S. W. 2d 31, 34; *Finley* v. *State,* 153 Fla. 394, 14 So. 2d 844; *State* v. *Browning,* 206 Ark. 791, 793–798, 178 S. W. 2d 77, 78–80; *Russell* v. *State,* 196 Ga. 275, 285, 26 S. E. 2d 528, 534.

[30] Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442; 42 Mich. L. Rev. 679; 56 Harv. L. Rev. 1008; 47 Col. L. Rev. 1214. See Statement of Special Committee on the Bill of Rights of the American Bar Association, p. VI, which advocates maintenance of *McNabb* rule until a better system for dealing with confessions to police can be devised.

[31] "5 (b) EXCLUSION OF STATEMENT SECURED IN VIOLATION OF RULE. No statement made by a defendant in response to interrogation by an officer or agent of the government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule."

[32] Holtzoff, Institute on Federal Criminal Rules, 29 A. B. A. J. 603.

administration of our criminal laws should make this Court, so far removed from the actualities of crime prevention, hesitate long before pushing farther by judicial legislation its conception of the proprieties in criminal investigation. It takes this step in the belief that thereby it strengthens criminal administration by protecting a prisoner. A prisoner should have protection but it is well to remember that law and order is an essential prerequisite to the protection of the security of all. Today's decision puts another weapon in the hand of the criminal world. Apparently the Court intends to make the rule of commitment "without unnecessary delay" [33] an iron rule without flexibility to meet the emergencies of conspiracies, search for confederates, or examining into the ramifications of criminality. The Court does this by failing to distinguish between necessary and unnecessary delay in commitment. It uses words like "forthwith" and "promptly" and thus destroys the leeway given by the Rule to police investigations. All, I think, without any need for such action since every coerced confession has been inadmissible for generations. The position stated in this dissent does not envisage a surrender to evils in the handling of criminals. If there is a prevalent abuse of the right to question prisoners, the sounder remedy lies in police discipline, in statutory punishment of offending officials, in vigorous judicial protection against unconstitutional pressures for confessions, and in legisla-

[33] Rule 5 (a), Rules of Criminal Procedure. The language of the Rule was adopted to allow desirable flexibility in the time of commitment. See Notes to Rules of Criminal Procedure, as prepared under the direction of the Advisory Committee; Hearings, *supra*, pp. 36, 39. In Memorandum on the Detention of Arrested Persons, *supra*, it is stated at p. 30 with reference to the phrase "within a reasonable time": "This phrase would have the advantage of saving confessions where the delay in committal was brief and reasonably explained; here the existing tendency of lower courts to apply the McNabb rule rigidly is pretty harsh on the government."

tive enactments for inquiries into circumstances surrounding crimes by methods that protect both the public and suspects—for example, an inquiry before a magistrate with sealed evidence.

I would affirm this conviction in reliance upon the verdict of the properly instructed jury that this was a voluntary confession.

UVEGES *v.* PENNSYLVANIA.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 75. Argued November 15–16, 1948.—Decided December 13, 1948.

1. Without being advised of his right to counsel or being offered counsel at any time between arrest and conviction, a 17-year-old youth charged in a Pennsylvania state court under four indictments with four separate burglaries, for which he could have been given maximum sentences aggregating 80 years, pleaded guilty and was sentenced to from five to ten years on each indictment, the sentences to run consecutively. The record showed no attempt on the part of the court to make him understand the consequences of his plea. *Held:* He was denied due process of law contrary to the Fourteenth Amendment. Pp. 438–442.
2. The due process clause of the Fifth or the Fourteenth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials. P. 441.
3. The record before this Court adequately raised the federal constitutional question as to denial of the right to counsel. Pp. 438–439.
4. Since it appears that in Pennsylvania habeas corpus is available to an accused whose constitutional right to counsel has been denied, and since the state does not suggest that it bars a remedy by habeas corpus in the circumstances of this case because no appeal was taken from the original conviction, this Court decides this case on its merits. P. 440.

161 Pa. Super. 58, 53 A. 2d 984, reversed.

Without a hearing, a Pennsylvania court of common pleas dismissed a petition for a writ of habeas corpus to

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review petitioner's conviction, on his pleas of guilty, for four separate burglaries. The Superior Court of Pennsylvania affirmed. 161 Pa. Super. 58, 53 A. 2d 894. The Supreme Court of Pennsylvania denied a petition for allowance of an appeal. 161 Pa. Super. xxv, 53 A. 2d 894. This Court granted certiorari. 334 U. S. 836. *Reversed,* p. 442.

Albert A. Fiok argued the cause and filed a brief for petitioner.

William S. Rahauser argued the cause for respondent. With him on the brief was *Craig T. Stockdale.*

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner is held by the Commonwealth of Pennsylvania in the Western State Penitentiary on sentences totalling a minimum of twenty and a maximum of forty years pronounced pursuant to his pleas of guilty to four indictments charging burglary. We granted certiorari to review a denial by the Supreme Court of Pennsylvania of his petition to appeal from a judgment of the Superior Court which affirmed a dismissal of a petition for *habeas corpus* in the Court of Common Pleas of Allegheny County. Petitioner claimed in the state courts, and now claims here, that he was denied counsel in the proceedings leading to his convictions in violation of his right to counsel under the due process of law clause of the Fourteenth Amendment.

From the pleadings and decisions of the Pennsylvania courts, certified to us as the record in the Supreme Court of Pennsylvania, and without reliance upon any additional allegations in the petition for certiorari, the facts and allegations as to denial of constitutional rights may be summarized as follows: On October 27, 1938, petitioner Uveges, a youth seventeen years of age, was faced with

four district attorney's indictments charging four separate burglaries. Upon his plea of guilty to these indictments, Uveges was sentenced in the Court of Oyer and Terminer of Allegheny County to from five to ten years on each indictment, the sentences to run consecutively. In his petition to the Court of Common Pleas for a writ of *habeas corpus* in 1946, petitioner alleged that he was not informed of his right to counsel nor was counsel offered him at any time during the period between arrest and conviction. He also alleged that "frightened by threats of dire consequences if he dared to stand trial, relator pleaded guilty under the direction of an assistant district attorney, with the understanding that a sentence to Huntington Reformatory would be imposed." We disregard this last allegation because it was not presented to the Supreme Court of Pennsylvania in the petition for allowance of appeal. A rule to show cause why the writ should not issue was granted. The answer denied that petitioner was entitled to counsel but did not deny the allegation of threats by the assistant district attorney. The Court of Common Pleas, without a hearing, entered an order dismissing the petition and denying the writ. The Superior Court of Pennsylvania affirmed, 161 Pa. Super. 58, 53 A. 2d 894, noting that Uveges had been arrested once before for burglary and confined in a reformatory for ten months. The State Supreme Court, on September 29, 1947, denied a petition for allowance of appeal which repeated the allegations of youth and denial of the right to counsel. 161 Pa. Super. xxv, 53 A. 2d 894. We think this record adequately raised the federal constitutional question as to denial of counsel. Pennsylvania makes no contrary contention.[1] We granted the

[1] Excerpts from the brief of the Commonwealth show its acceptance of the actual issue:

"3. The basic question of this case is whether the petitioner was denied due process of law by reason of the fact that the Common-

motion to proceed *in forma pauperis* and the petition for a writ of certiorari, 334 U. S. 836, in order to examine the important constitutional question presented by petitioner's claim of right to counsel.[2]

Since our understanding is that in Pennsylvania *habeas corpus* is available to an accused whose constitutional right to counsel has been denied,[3] and since respondent does not suggest that the state bars a remedy by *habeas corpus* in the circumstances of this case because no appeal was taken from the original conviction, we proceed to the merits of this controversy.

Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that

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wealth of Pennsylvania did not appoint Counsel to represent him in the proceedings leading to his imprisonment. It is the contention of the respondent that the federal Constitution did not require that the state appoint Counsel to represent this accused since

"(A) The requirement of the 6th Amendment to the federal constitution that the accused be represented by counsel in *all* criminal cases does not apply to the states and

"(B) It is only in a capital case or under other special circumstances *not here present* that a state is required by the 14th Amendment to the Federal Constitution to appoint counsel to represent the accused."

"The vital question to be decided, and, in our view of the case the only significant question, is whether the accused, under such facts as are properly before this Court, must be represented by counsel in order that the process leading to his confinement may be deemed *due* process."

[2] Petitioner in his petition for certiorari bases his claim for review in part on procedural irregularities allegedly in violation of state statutes, such as the failure of the district attorney personally to sign the indictments. Since these allegations, even if true, present no federal question, we have not considered them.

[3] See *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41, 47–48, 24 A. 2d 1, 4–5; *Commonwealth ex rel. Penland* v. *Ashe*, 341 Pa. 337, 341–42, 19 A. 2d 464, 466.

the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See *Bute* v. *Illinois,* 333 U. S. 640, dissent, 677–79. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel.[4] Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See *Betts* v. *Brady,* 316 U. S. 455, 462. Where the gravity of the crime and other factors—such as the age and education of the defendant,[5] the conduct of the court or the prosecuting officials,[6] and the complicated nature of the offense charged and the possible defenses thereto [7]—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group holds that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel.

The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials. The application of the rule varies as indicated in the preceding paragraph.

Under either view of the requirements of due process, the facts in this case required the presence of counsel at

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[4] See *Rice* v. *Olson,* 324 U. S. 786, 788–89; *Walker* v. *Johnston,* 312 U. S. 275, 286; *Johnson* v. *Zerbst,* 304 U. S. 458, 468.

[5] See *e. g., Wade* v. *Mayo,* 334 U. S. 672, 683–84; *De Meerleer* v. *Michigan,* 329 U. S. 663, 664–65; *Betts* v. *Brady, supra,* at 472, *Powell* v. *Alabama,* 287 U. S. 45, 51–52, 71.

[6] See *e. g., Townsend* v. *Burke,* 334 U. S. 736, 739–41; *De Meerleer* v. *Michigan, supra,* at 665; *Smith* v. *O'Grady,* 312 U. S. 329, 332–33.

[7] See *e. g., Rice* v. *Olson,* 324 U. S. 786, 789–91.

petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an adviser to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years.[8] There is an undenied allegation that he was never advised of his right to counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea. Whatever our decision might have been if the trial court had informed him of his rights and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element of a fair hearing.

Reversed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON and MR. JUSTICE BURTON concur, dissenting.

Exercise of this Court's jurisdiction is peculiarly for this Court's own determination, and is neither to be conceded nor withheld by counsel's admission. In fact, however, Pennsylvania does not admit that the adjudication by the Supreme Court of Pennsylvania is reviewable here. It urges that "under such facts as are properly before this Court" petitioner's claim must fail. The circumstances under which this Court is reversing the Supreme Court of Pennsylvania show such disregard for the distribution of judicial power between this Court and the highest courts of the States, that I am constrained to dissent.

As the caption announces, this case was brought here by a writ of certiorari directed to the Supreme Court of

[8] Purdon's Pa. Stat. Ann., tit. 18, § 4901.

Pennsylvania. We issued the writ solely on the basis of allegations in the petition for certiorari. In sum, these were the allegations: (1) petitioner was held for two weeks without being able to consult friends or relatives; (2) because of his youth, his ignorance and the complexity of the charges against him, petitioner was incapable of meeting them intelligently without assistance of counsel; (3) his request for legal aid to determine his plea was met with a threat of a severe sentence if the Commonwealth were put to the expense of a trial; (4) he was promised by the District Attorney a short sentence at a reformatory for a plea of guilty; (5) he was not informed of the consequences of a plea of guilty, was unaware of its effect, and intended to plead guilty only to one of several indictments.

On these allegations, without more, we granted the petition for certiorari on June 7, 1948. The record before the Supreme Court of Pennsylvania, on the basis of which that Court denied the petition for an appeal to review the order of the Superior Court affirming the refusal of the Court of Common Pleas of Allegheny County to issue a writ of *habeas corpus,* was not before us when we granted certiorari. Not until September 8, 1948, was that record sent here by the Supreme Court of Pennsylvania; it was lodged here on September 20, 1948. It now appears that the allegations on which this Court issued its writ to the Pennsylvania Supreme Court were not before that Court in the paper it requires to be filed to determine whether under Pennsylvania law an appeal should be entertained. More particularly, the five allegations summarized above had not been before the Supreme Court of Pennsylvania when it denied an appeal. Apart from two claims involving matters of local procedure, the only ground on which appeal was sought from the Pennsylvania Superior Court was the bare claim that petitioner was denied assistance of counsel, unsupported

by those considerations of unfairness which, under our rulings, make such denial a denial of the due process guaranteed by the Fourteenth Amendment.

Having granted a review of the action of the Pennsylvania Supreme Court on the basis of allegations not before that Court, this Court now holds that the Supreme Court of Pennsylvania has flouted the Constitution of the United States. It does so despite the fact that at the bar of this Court the representative of Pennsylvania unreservedly admitted that the writ of *habeas corpus* would not have been dismissed by the courts of Pennsylvania if the allegations that were made here had been made there. We are reviewing what the Pennsylvania Supreme Court did. The only matter before that Court was a petition for an allowance of an appeal from the order of the Superior Court of Pennsylvania. The only matter properly before us is disallowance of that appeal. If the Supreme Court of Pennsylvania was, as a matter of State law, authorized to disallow the appeal because the claim was not formulated with adequate particularity, a federal question is wanting and our writ, being without proper foundation, should be dismissed. The fact that on adequate allegations in a new proceeding before an appropriate Pennsylvania court the claim may be successfully sustained, gives this Court no warrant for assuming that the proper allegations were before the Pennsylvania Supreme Court so as to transmute its denial of an appeal into the denial of a properly presented federal claim.

This Court now makes such an assumption. If we are to decide a case, however grave the issue, only on what appears according to the record, there is no basis for finding that the Supreme Court had before it anything but the petition for allowance of an appeal. This is so even if we assume, although nothing in the record affords

us the right to do so,[1] that the records in the lower courts of Pennsylvania were filed in its Supreme Court before it disallowed an appeal. Appellants often do not raise all that they urged in a lower court, and they sometimes raise an issue for the first time in the appellate court. In any event, the petition here was to review the adjudication of the Supreme Court of Pennsylvania and our writ ran to that Court. This is not a case where our writ turns out to be formally misdirected due to the fact that the record to be sent up was lodged, according to local procedure, in one court rather than another. In such a case what

[1] The relevant docket entries of the three Pennsylvania courts which considered this case strongly indicate that all papers other than the petition for allowance of an appeal were in the Court of Common Pleas for Allegheny County when the Pennsylvania Supreme Court was determining the allowance of an appeal. The "Docket Entries" in the Superior Court of Pennsylvania record that on July 29, 1947, twelve days after that court affirmed the order of the Court of Common Pleas, the Record of the Court of Common Pleas, which had been filed in the Superior Court, was remitted to the Court of Common Pleas. The latter court's "Appearance Docket Entry" shows that it was received on the same day. Twenty-four days later, on August 22, 1947, the petitioner filed in the Supreme Court of Pennsylvania his petition for allowance of appeal from the judgment of the Superior Court. The Docket Entries in the Supreme Court of Pennsylvania do not show that the Record which previously had been sent back to the Court of Common Pleas by the Superior Court had been filed in that Court.

After this Court issued its writ on June 7, 1948, petitioner's attorney filed a "Praecipe" with the Clerk of the Supreme Court of Pennsylvania requesting that the papers that now make up the record in this Court be certified to this Court. Although this was done under the Clerk's signature with a statement that "the foregoing Record . . . is a true and faithful copy of the Record and Proceedings of THE SUPREME COURT OF PENNSYLVANIA . . . in a certain suit therein pending . . ." that Record shows that the Supreme Court of Pennsylvania, after our writ of certiorari had been directed to it, had to issue its supplemental certiorari to the Court of Common Pleas to obtain the Record.

is reviewed here, despite the misdirection, is the same record that was before the State court which is to be reviewed. The writ runs to the other court only to get the record here. This case presents quite a different situation. We cannot review the judgment of the Court of Common Pleas of Allegheny County, or that of the Superior Court of Pennsylvania, because neither is a final judgment under Pennsylvania law if either involved a federal constitutional issue. For our purpose of "finality," such an issue must go to the Supreme Court of Pennsylvania because that Court has obligatory jurisdiction to review it. Pa. Stat. Ann., tit. 17, § 190; *Commonwealth* v. *Caulfield,* 211 Pa. 644; see *Commonwealth* v. *Gardner,* 297 Pa. 498, 500. In bringing here for review the action of that Court we must be governed by what was before that Court and cannot rely on what was not before it.

Unless we are to assume that the Supreme Court of Pennsylvania flagrantly violated its duty under Pennsylvania law to grant an appeal where a violation of a right secured by the Constitution of the United States is properly raised, we must attribute to that court a non-constitutional ground in denying an appeal if it may reasonably be so attributed. If that Court had said explicitly that it requires a more particularized statement for the claim that the petitioner did not plead guilty with full understanding of what he was doing and that the failure to assign him counsel in no wise handicapped him in pleading to the indictments, this Court hardly would find that the Constitution of the United States precludes such a State requirement of particularity in an effort to set aside a sentence eight years after it was imposed. If such a determination by the Supreme Court of Pennsylvania explicitly made would not raise a federal question, it does not raise a federal question if on the record we have a right to infer that such was the implicit ruling of the Pennsyl-

vania Court. That Court may dispose of cases summarily as does this Court. The record here plainly calls for the inference that the claims now made were not adequately presented in the paper upon which the Supreme Court of Pennsylvania acted. A comparison between the statements which the Supreme Court of Pennsylvania had before it when it denied the appeal, and the allegations made in the petition before this Court, on the basis of which we issued the writ of certiorari, affords compelling reason for attributing the disallowance of the appeal by the Pennsylvania Supreme Court to its finding that a claim of lack of due process raised after eight years was made without sufficient particularity to call for a trial on the merits. A tabular view of the claims made in the four courts before which they were pressed clearly establishes not only that what was before the Supreme Court of Pennsylvania was very different from what was urged here, but also different from what was urged before the lower Pennsylvania courts.* A finding that a State court disregarded the Constitution of the United States should not be like a game of blindman's buff.

Since the action of the State court may fairly be sustained on the State ground of failure adequately to present the constitutional claim sought to be raised, we must so interpret it. *Klinger* v. *Missouri,* 13 Wall. 257, 263; *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, 54; *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206, 212. Our reviewing power is of course not to be withheld by excogitating some fanciful or recondite doctrine of local law for a State court decision. Here the State ground is fairly obvious. To reject it is to reach out for a federal issue. The Pennsylvania courts are fully aware of the circumstances under which indigent defend-

*[See table on next page.]

CLAIMS MADE IN THE VARIOUS COURTS

I	II	III	IV
Court of Common Pleas of Allegheny County	*Superior Court of Pennsylvania*	*Supreme Court of Pennsylvania*	*Supreme Court of the United States*
Petition for writ of habeas corpus	Court's opinion	Petition for allowance of appeal	Petition for writ of certiorari
[1] Bare denial of right to counsel.	[1] Same.	[1] Same.	[1] Failure to assign counsel resulted in unfair trial; disabled him from making intelligent plea and led to overreaching by D. A.
[2] Signature lacking on indictment as waiver of grand jury presentation. Claims waiver not read to him.	[2] Same.	[2] Here denied he signed a waiver.	[2] Signature not on indictment.
[3] Right of 17-year-old boy to disaffirm plea of guilt. Also claim of threats and promise of shorter sentence.	[3] Apparently no such claim.	[3] No such claim.	[3] Same as No. 3, Column I.
	[4] Claims to have entered plea of guilty to only one of nine indictments.	[4] Same.	[4] Same.
			[5] Held incommunicado for two weeks. [6] Refusal of request for consultation with counsel followed by threats. [7] Witnesses not sworn.

ants are entitled to the assistance of counsel. See *e. g. Commonwealth ex rel. McGlinn* v. *Smith,* 344 Pa. 41. Only by assuming that the Supreme Court of Pennsylvania was heedless of its duty under the Constitution can we assume that it denied an appeal in this case because of such heedlessness rather than because it enforced allowable requirements by Pennsylvania for asserting a constitutional claim.

Such reasoning is not what is invidiously called legalistic. Law is essentially legalistic in the sense that observance of well-recognized procedure is, on balance, socially desirable. In the well-being of a federalism like ours observance of what on casual view may appear as a sterile technicality is important whenever this Court is brought in potential conflict with State courts. Especially is it important as to those vast reaches of the criminal law which are exclusively within State domain, and which are therefore not subject to the supervision which this Court may exercise over the lower federal courts. Of course this Court has the duty of alertness in safeguarding rights guaranteed by the Constitution of the United States against infringement by the States even in their difficult task of repressing crime and dealing with transgressors. At best, however, intervention by this Court in the criminal process of States is delicate business. It should not be indulged in unless no reasonable doubt is left that a State denies, or has refused to exercise, means of correcting a claimed infraction of the United States Constitution.

Intervention by this Court in the administration of the criminal justice of a State has all the disadvantages of interference from without. Whatever short-cut to relief may be had in a particular case, it is calculated to beget misunderstanding and friction and to that extent detracts from those imponderables which are the ultimate reliance of a civilized system of law. After all, this is the Nation's

ultimate judicial tribunal, not a super-legal-aid bureau. If the same relief, although by a more tedious process, is available through a State's self-corrective process, it enlists the understanding and support of the community. Considerations rooted in psychological and sociological reason underlie the duty of abstention by this Court from upsetting convictions by State courts or their refusal to grant writs of *habeas corpus* to those under State sentences, where State action may fairly be attributed to a rule of local procedure and is not exclusively founded on denial of a federal claim. When a State court explicitly rests its decision on a State ground it is easy sailing. But even when a State court summarily disposes of a case without spelling out its ground, led to do so, as is this Court in many cases, by the burden of its docket, it is our duty not to attribute to the State court flouting of the United States Constitution but to infer regard for its own law, if to that law may reasonably be attributed a finding of inadequacy in the mode of presenting the constitutional claim for which relief is here sought on the merits.

I would dismiss the writ, leaving petitioner to pursue in Pennsylvania the claim he makes here.

McDONALD ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 36. Argued October 13, 1948.—Decided December 13, 1948.

Suspecting that petitioner McDonald was operating an illegal lottery, police had kept him under surveillance for two months. Thinking that they detected from the outside the sound of an adding machine, they forced their way, without a warrant for search or arrest, into a rooming house in which he had rented a room. They proceeded to his room, looked through the transom, and observed petitioners McDonald and Washington engaged in operating a lottery. Demanding and obtaining entrance, they arrested both petitioners and seized machines, papers and money which were in plain view. These articles were admitted in evidence over the objection of petitioners, who were convicted. *Held:*

1. The seizure was in violation of the Fourth Amendment, the seized articles were not admissible in evidence against McDonald, and his conviction cannot be sustained. Pp. 452–456.

2. A search without a warrant is not justified unless the exigencies of the situation make that course imperative. Pp. 454–456.

3. Even if it be assumed that Washington's constitutional rights were not invaded, the denial of McDonald's motion to exclude the evidence was, on these facts, prejudicial to Washington as well as to McDonald. P. 456.

83 U. S. App. D. C. 96, 166 F. 2d 957, reversed.

Petitioners were convicted in a federal district court on evidence obtained by a search without a warrant. The Court of Appeals affirmed. 83 U. S. App. D. C. 96, 166 F. 2d 957. This Court granted certiorari. 333 U. S. 872. *Reversed,* p. 456.

Charles E. Ford and *John Lewis Smith, Jr.* argued the cause and filed a brief for petitioners.

Frederick Bernays Wiener argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners were convicted in the District Court on evidence obtained by a search made without a warrant. The Court of Appeals affirmed on a divided vote. 83 U. S. App. D. C. 96, 166 F. 2d 957. We brought the case here on certiorari because of doubts whether that result squared with *Johnson* v. *United States,* 333 U. S. 10, and *Trupiano* v. *United States,* 334 U. S. 699.

Petitioners were tried without a jury in the District Court for the District of Columbia on an indictment in four counts, charging offenses of carrying on a lottery known as the numbers game in violation of 22 D. C. Code §§ 1501, 1502, 1504 (1940). They were found guilty on all counts.

Petitioner McDonald, who had previously been arrested for numbers operations, had been under police observation for several months prior to the arrest. During this period and while he was maintaining a home in the District of Columbia, he rented a room in the residence of a Mrs. Terry, who maintained a rooming house in the District. His comings and goings at this address were under surveillance by the police for about two months. They had observed him enter the rooming house during the hours in which operations at the headquarters of the numbers game are customarily carried on.

On the day of the arrest three police officers surrounded the house. This was midafternoon. They did not have a warrant for arrest nor a search warrant. While outside the house, one of the officers thought that he heard an adding machine. These machines are frequently used in the numbers operation. Believing that the numbers game was in process, the officers sought admission to the house.

One of them opened a window leading into the landlady's room and climbed through. He identified himself to her and admitted the other officers to the house.

After searching the rooms on the ground floor, they proceeded to the second floor. The door of an end bedroom was closed. But one of the officers stood on a chair and looked through the transom. He observed both petitioners in the room, as well as numbers slips, money piled on the table, and adding machines. He yelled to McDonald to open the door and McDonald did so. Both petitioners were arrested, and the officers seized the machines, a suitcase of papers, and money. Whether these machines and papers should have been suppressed as evidence and returned to petitioner McDonald is the major question presented.

The Fourth Amendment to the Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation. And the law provides as a sanction against the flouting of this constitutional safeguard the suppression of evidence secured as a result of the violation, when it is tendered in a federal court. *Weeks* v. *United States,* 232 U. S. 383.

The prosecution seeks to build the lawfulness of the search on the lawfulness of the arrest and so justify the

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search and seizure without a warrant. See *Agnello* v. *United States,* 269 U. S. 20, 30; *Harris* v. *United States,* 331 U. S. 145, 150–151. The reasoning runs as follows: Although it was an invasion of privacy for the officers to enter Mrs. Terry's room, that was a trespass which violated her rights under the Fourth Amendment, not McDonald's. Therefore so far as he was concerned, the officers were lawfully within the hallway, as much so as if Mrs. Terry had admitted them. Looking over the transom was not a search, for the eye cannot commit the trespass condemned by the Fourth Amendment. Since the officers observed McDonald in the act of committing an offense, they were under a duty then and there to arrest him. See 4 D. C. Code §§ 140, 143 (1940). The arrest being valid the search incident thereto was lawful.

We do not stop to examine that syllogism for flaws. Assuming its correctness, we reject the result.

This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law. They had been following McDonald and keeping him under surveillance for two months at this rooming house. The prosecution now tells us that the police had no probable cause for obtaining a warrant until, shortly before the arrest, they heard the sound of the adding machine coming from the rooming house. And there is vague and general testimony in the record that on previous occasions the officers had sought search warrants but had been denied them. But those statements alone do not lay the proper foundation for dispensing with a search warrant.

Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances, as we held in *Johnson* v. *United States, supra.* We will not assume that where a defendant has been under surveillance

for months, no search warrant could have been obtained. What showing these officers made when they applied on the earlier occasions, the dates of these applications, and all the circumstances bearing upon the necessity to make this search without a warrant are absent from this record. We cannot allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily. Moreover, when we move to the scene of the crime, the reason for the absence of a search warrant is even less obvious. When the officers heard the adding machine and, at the latest, when they saw what was transpiring in the room, they certainly had adequate grounds for seeking a search warrant.

Here, as in *Johnson* v. *United States* and *Trupiano* v. *United States,* the defendant was not fleeing or seeking to escape. Officers were there to apprehend petitioners in case they tried to leave. Nor was the property in the process of destruction nor as likely to be destroyed as the opium paraphernalia in the *Johnson* case. Petitioners were busily engaged in their lottery venture. No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement, as we held in *Johnson* v. *United States, supra,* p. 15.

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest

of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

It follows from what we have said that McDonald's motion for suppression of the evidence and the return of the property to him should have been granted. *Weeks* v. *United States, supra; Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 358. It was, however, denied and the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. In this case, unlike *Agnello* v. *United States, supra,* p. 35, the unlawfully seized materials were the basis of evidence used against the codefendant. If the property had been returned to McDonald, it would not have been available for use at the trial. We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative.

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE RUTLEDGE concurs in the result, and in the opinion insofar as it relates to the petitioner McDon-

ald. With respect to the petitioner Washington he is of the view that the evidence, having been illegally obtained, was inadmissible. Cf. *Malinski* v. *New York*, 324 U. S. 401, opinion dissenting in part p. 420 at pp. 430–432.

MR. JUSTICE JACKSON, concurring.

I agree with the result and with the opinion of the Court. But it rejects the search which two courts below have sustained without saying wherein it was wrong. It may be helpful to lower courts and to the police themselves to state what appears to some of us as the reason this search is bad.

The police for several weeks had this defendant, McDonald, under surveillance. The United States Commissioner was approached about a search warrant but, for reasons which do not appear, declined to issue it. The only additional information which led the officers to take the law into their own hands and make this search without a warrant was that they heard an adding machine or a typewriter—the witness was not sure which—operating on the premises. Certainly the sound of an adding machine or typewriter, standing alone, is no indication of crime and it could become significant only when weighed in connection with other evidence. A magistrate might either have issued or refused a warrant if request had been made.

However, the officer in charge of the investigation took the matter into his own hands. He neither had nor sought a search warrant or warrant of arrest; he did not then have knowledge of a crime sufficient, even in his own opinion, to justify arrest, and he did not even know that the suspect, McDonald, was in the rooming house at the time. Nevertheless, he forced open the window of the landlady's bedroom and climbed in. He apparently was in plain clothes but showed his badge to the frightened woman, brushed her aside and then

unlocked doors and admitted two other officers. They then went to the hall outside the room rented and occupied by defendant. The officer in charge climbed on a chair and looked through a transom. Seeing the defendant McDonald engaged in activity which he considered to be part of the lottery procedure, he arrested him and searched the quarters. The Government argued, and the court below held, that since the forced entry into the building was through the landlady's window, in a room in which the defendant as a tenant had no rights, no objection to this mode of entry or to the search that followed was available to him.

Doubtless a tenant's quarters in a rooming or apartment house are legally as well as practically exposed to lawful approach by a good many persons without his consent or control. Had the police been admitted as guests of another tenant or had the approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. Like any other stranger, they could then spy or eavesdrop on others without being trespassers. If they peeped through the keyhole or climbed on a chair or on one another's shoulders to look through the transom, I should see no grounds on which the defendant could complain. If in this manner they, or any private citizen, saw a crime in the course of commission, an arrest would be permissible.

But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry. Here the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal. In prying up the porch window and climbing

into the landlady's bedroom, they were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing. Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality. *Cf. Weeks* v. *United States,* 232 U. S. 383; *Taylor* v. *United States,* 286 U. S. 1; *Johnson* v. *United States,* 333 U. S. 10.

Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. This method of law enforcement displays a shocking lack of all sense of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it. In this case the police had been over two months watching the defendant McDonald. His criminal operation, while a shabby swindle that the police are quite right in suppressing, was not one which endangered life or limb or the peace and good order of the community even if it continued another day or two; neither was the racket one the defendant was likely to abandon. Conduct of the numbers racket is not a solitary vice, practiced in secrecy and discoverable only by crashing into dwelling houses. The real difficulty is that it is so little condemned by otherwise law-abiding people that it flourishes widely and involves multitudes of people. It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to

apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime. Almost without exception, the overzeal was in suppressing acts not *malum in se* but only *malum prohibitum*.[1] While the enterprise of parting fools from their money by the "numbers" lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her

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[1] For example, the instant case involves a statute forbidding lotteries in the District of Columbia; *Trupiano* v. *United States*, 334 U. S. 699, liquor control and revenue statutes; *Johnson* v. *United States*, 333 U. S. 10, narcotic control and revenue statutes; *Nathanson* v. *United States*, 290 U. S. 41, liquor control and tariff statute. Other cases involving liquor control or taxing statutes, or both, are numerous; see, *e. g.*, *Taylor* v. *United States*, 286 U. S. 1; *United States* v. *Lefkowitz*, 285 U. S. 452; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *Gambino* v. *United States*, 275 U. S. 310; *Amos* v. *United States*, 255 U. S. 313. *Agnello* v. *United States*, 269 U. S. 20, involved cocaine control and taxing statutes; and *Weeks* v. *United States*, 232 U. S. 383, involved a statute forbidding use of the mails to distribute lottery tickets.

bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.

As to defendant Washington: He was a guest on the premises. He could have no immunity from spying and listening by those rightfully in the house. But even a guest may expect the shelter of the rooftree he is under against criminal intrusion. I should reverse as to both defendants.

MR. JUSTICE FRANKFURTER, having joined in the Court's opinion, also concurs in this opinion.

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE and MR. JUSTICE REED join, dissenting.

In our opinion the judgment should have been affirmed. This is a case of a lawful arrest followed by a seizure of the instruments of the crime which then were in plain sight. There was no search. There is, therefore, no issue as to the need for a search warrant. In regard to the arrest, the only issue is as to the need for a warrant of arrest to make it lawful. For the reasons stated below, we believe the arrest for the crime committed in the presence of the officers was clearly lawful without the issuance of a formal warrant for it. At the time of the raid, there were sufficient grounds to justify the police in suspecting that the unlawful lottery, which later proved to be in operation, was in progress within the building which had

been under surveillance. A "numbers game," such as was there conducted, is a form of lottery generally regarded as detrimental to the communities where it flourishes. It is highly profitable to its principals at the expense of its players. Yet it is so simple in operation that its headquarters are readily movable. Accordingly, it requires substantial police effort to stop such unlawful operations at their source. It is difficult to locate the principals and it is still more difficult to secure proof sufficient to convict them unless they are arrested in the midst of one of the comparatively brief periodical sessions when the essential computations for the operation of the lottery are being made. Such sessions are held when the operators determine the day's winners and arrange for the distribution among those winners of their respective shares of the cash which has been collected through a network of writers, collectors and runners.

Under the circumstances, a prompt entry by the police was justified when they reasonably suspected that the crime of operating a numbers lottery was being committed at that moment. The petitioners, as tenants or occupants of a room, had no right to object to the presence of officers in the hall of the rooming house. The actual observance by the police of the commission of the suspected crime thereupon justified their immediate arrest of those engaged in it without securing a warrant for such arrest.

This case is primarily an instance where the police succeeded in surprising the petitioners in the midst of the unlawful operations which the police suspected were being carried on periodically by McDonald as a principal operator and by others at the place in question. It is generally not a violation of any constitutional privilege of the accused for a police officer to arrest such accused without a warrant of arrest if the arrest is made at the

very moment when the accused is engaged in a violation of law in the presence of the officer. It is generally not a violation of any constitutional privilege of such accused for the arresting officer thereupon to seize at least the articles then in plain sight and which have been seen by the officer to have been used in the commission of the crime for which the accused is being arrested. We see no adequate reason for a distinction in favor of the accused here. In this case there was no search for the seized property because its presence was obvious. Also, there was no seizure of anything other than the articles which the arresting officer saw in use in some material connection with the crime which the accused committed in the officer's presence. It, therefore, was not a violation of the constitutional rights of the accused to permit such seized articles to be presented in evidence in securing their convictions of the crimes which they were charged with committing in the presence of the arresting officer.

GOESAERT ET AL. *v.* CLEARY ET AL., MEMBERS OF THE LIQUOR CONTROL COMMISSION OF MICHIGAN.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 49. Argued November 19, 1948.—Decided December 20, 1948.

Mich. Stat. Ann. (Cum. Supp. 1947) § 18.990 (1), which in effect forbids any female to act as a bartender unless she be "the wife or daughter of the male owner" of a licensed liquor establishment, does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 465–467.

(a) The classification which Michigan has made as between wives and daughters of owners of liquor establishments and wives and daughters of non-owners is not without a reasonable basis. Pp. 465–467.

(b) Nor is the statute rendered unconstitutional because Michigan allows women to serve as waitresses where liquor is dispensed. P. 467.

74 F. Supp. 735, affirmed.

A three-judge federal district court denied an injunction to restrain enforcement of Mich. Stat. Ann. (Cum. Supp. 1947) § 18.990 (1), in effect forbidding any female to act as a bartender unless she be "the wife or daughter of the male owner" of a licensed liquor establishment. 74 F. Supp. 735. On appeal to this Court, *affirmed,* p. 467.

Anne R. Davidow argued the cause and filed a brief for appellants. *Larry S. Davidow* was also of counsel.

Edmund E. Shepherd, Solicitor General of Michigan, argued the cause for appellees. With him on the brief were *Eugene F. Black,* Attorney General, *Daniel J. O'Hara* and *Charles M. A. Martin,* Assistant Attorneys General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

As part of the Michigan system for controlling the sale of liquor, bartenders are required to be licensed in all cities having a population of 50,000 or more, but no female may be so licensed unless she be "the wife or daughter of the male owner" of a licensed liquor establishment. Section 19a of Act 133 of the Public Acts of Michigan, 1945, Mich. Stat. Ann. § 18.990 (1) (Cum. Supp. 1947). The case is here on direct appeal from an order of the District Court of three judges, convened under § 266 of the old Judicial Code, now 28 U. S. C. § 2284, denying an injunction to restrain the enforcement of the Michigan law. The claim, denied below, one judge dissenting, 74 F. Supp. 735, and renewed here, is that Michigan cannot forbid females generally from being barmaids and at the same time make an exception in favor of the wives and daughters of the owners of liquor establishments. Beguiling as the subject is, it need not detain us long. To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made between wives and daughters of owners of liquor places and wives and daughters of non-owners, is one of those rare instances where to state the question is in effect to answer it.

We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare, but centuries before him she played a role in the social life of England. See, *e. g.*, Jusserand, English Wayfaring Life in the Middle Ages, 133, 134, 136–37 (1889). The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers. Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes

in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. See the Twenty-First Amendment and *Carter* v. *Virginia,* 321 U. S. 131. The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.

While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations "which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas,* 310 U. S. 141, 147. Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws. We cannot cross-examine either actually or argumentatively the mind of Michigan legis-

lators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.

It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of the equal protection of the laws has been applied. The generalities on this subject are not in dispute; their application turns peculiarly on the particular circumstances of a case. Thus, it would be a sterile inquiry to consider whether this case is nearer to the nepotic pilotage law of Louisiana, sustained in *Kotch* v. *Pilot Commissioners,* 330 U. S. 552, than it is to the Oklahoma sterilization law, which fell in *Skinner* v. *Oklahoma,* 316 U. S. 535. Suffice it to say that "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen* v. *Ward,* 279 U. S. 337, 339.

Nor is it unconstitutional for Michigan to withdraw from women the occupation of bartending because it allows women to serve as waitresses where liquor is dispensed. The District Court has sufficiently indicated the reasons that may have influenced the legislature in allowing women to be waitresses in a liquor establishment over which a man's ownership provides control. Nothing need be added to what was said below as to the other grounds on which the Michigan law was assailed.

Judgment affirmed.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join, dissenting.

While the equal protection clause does not require a legislature to achieve "abstract symmetry" [1] or to classify

[1] *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144.

with "mathematical nicety,"[2] that clause does require lawmakers to refrain from invidious distinctions of the sort drawn by the statute challenged in this case.[3]

The statute arbitrarily discriminates between male and female owners of liquor establishments. A male owner, although he himself is always absent from his bar, may employ his wife and daughter as barmaids. A female owner may neither work as a barmaid herself nor employ her daughter in that position, even if a man is always present in the establishment to keep order. This inevitable result of the classification belies the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women who, but for the law, would be employed as barmaids. Since there could be no other conceivable justification for such discrimination against women owners of liquor establishments, the statute should be held invalid as a denial of equal protection.

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[2] *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–82; see also *Tigner* v. *Texas*, 310 U. S. 141, 147; *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 501; *Bryant* v. *Zimmerman*, 278 U. S. 63, 73–77; *Miller* v. *Wilson*, 236 U. S. 373, 384.

[3] Cf. *Skinner* v. *Oklahoma*, 316 U. S. 535; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151; *Yick Wo* v. *Hopkins*, 118 U. S. 356. And see *Kotch* v. *Pilot Commissioners*, 330 U. S. 552, dissenting opinion 564.

MICHELSON *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 23. Argued October 14–15, 1948.—Decided December 20, 1948.

1. In a trial in a federal court for bribery of a federal officer, the defendant admitted the payment but claimed that it was induced by the officer, and the case hinged on whether the jury believed the defendant or the officer. The defendant's character witnesses testified that they had known the defendant for from 15 to 30 years and that he had a good reputation for "honesty and truthfulness" and for "being a law-abiding citizen." In cross-examining them, the prosecutor was permitted to ask whether they had heard that the accused had been arrested 27 years previously for receiving stolen goods. The trial judge had satisfied himself in the absence of the jury that the question related to an actual occurrence, and he carefully instructed the jury as to the limited purpose of this evidence. *Held:* In the circumstances of this case and in view of the care taken by the trial judge to protect the rights of the defendant, permitting the prosecutor to ask this question was not reversible error. Pp. 470–487.
2. The law does not invest the defendant with a presumption of good character; it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The defendant may introduce evidence tending to prove his good reputation; but, if he does so, it throws open the entire subject and the prosecution may then cross-examine defendant's witnesses to test their credibility and qualifications and may also introduce contradictory evidence. Pp. 475–479.
3. Both the propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations, difficult to detect or appraise from a cold record. Therefore, rarely and only on clear showing of prejudicial abuse of discretion, will appellate courts disturb rulings of trial courts on this subject. P. 480.
4. In this case, the trial judge was scrupulous to safeguard the practice against any misuse. P. 481.
5. A character witness may be cross-examined as to knowledge of rumors of defendant's prior arrest, whether or not it culminated in a conviction. Pp. 482–483.

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6. It is not only by comparison with the crime on trial but by comparison with the reputation asserted that a court may judge whether the prior arrest should be made the subject of inquiry. Pp. 483–484.
7. That the inquiry concerned an arrest 27 years before the trial did not make its admission an abuse of discretion in the circumstances of this case—especially since two of the witnesses had testified that they had known defendant for 30 years, defendant, on direct examination, had voluntarily called attention to his conviction of a misdemeanor 20 years before, and since no objection was made on this specific ground. P. 484.
8. Notwithstanding the difficulty which a jury might have in comprehending instructions as to the limited purpose of such evidence, a defendant who elects to introduce witnesses to prove his good reputation for honesty and truthfulness and for being a law-abiding citizen has no valid complaint about the latitude which existing law allows to the prosecution to meet this issue by cross-examination of his character witnesses. Pp. 484–485.

165 F. 2d 732, affirmed.

Petitioner was convicted in a federal district court of bribing a federal officer. The Court of Appeals affirmed. 165 F. 2d 732. This Court granted certiorari. 333 U. S. 866. *Affirmed*, p. 487.

Louis J. Castellano argued the cause for petitioner. With him on the brief was *Daniel McNamara.*

Joseph M. Howard argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Robert S. Erdahl.*

Mr. Justice Jackson delivered the opinion of the Court.

In 1947 petitioner Michelson was convicted of bribing a federal revenue agent.[1] The Government proved a

[1] The first count charged petitioner with bribing in violation of 18 U. S. C. § 91 (now 18 U. S. C. § 201) and the affirmance of his conviction on this count by the Court of Appeals, 165 F. 2d 732, is the

large payment by accused to the agent for the purpose of influencing his official action. The defendant, as a witness on his own behalf, admitted passing the money but claimed it was done in response to the agent's demands, threats, solicitations, and inducements that amounted to entrapment. It is enough for our purposes to say that determination of the issue turned on whether the jury should believe the agent or the accused.[2]

On direct examination of defendant, his own counsel brought out that, in 1927, he had been convicted of a misdemeanor having to do with trading in counterfeit watch dials. On cross-examination it appeared that in 1930, in executing an application for a license to deal in second-hand jewelry, he answered "No" to the question whether he had theretofore been arrested or summoned for any offense.

Defendant called five witnesses to prove that he enjoyed a good reputation. Two of them testified that their acquaintance with him extended over a period of about thirty years and the others said they had known him at least half that long. A typical examination in chief was as follows:

"Q. Do you know the defendant Michelson?

"A. Yes.

"Q. How long do you know Mr. Michelson?

"A. About 30 years.

"Q. Do you know other people who know him?

"A. Yes.

"Q. Have you had occasion to discuss his reputation for honesty and truthfulness and for being a law-abiding citizen?

"A. It is very good.

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judgment here under review. The second count charged "offering" the bribe as a violation of the same statute but his conviction on this count was reversed by the Court of Appeals and is not here involved.

[2] Details appear in the Court of Appeals opinion, 165 F. 2d 732.

"Q. You have talked to others?
"A. Yes.
"Q. And what is his reputation?
"A. Very good."

These are representative of answers by three witnesses; two others replied, in substance, that they never had heard anything against Michelson.

On cross-examination, four of the witnesses were asked, in substance, this question: "Did you ever hear that Mr. Michelson on March 4, 1927, was convicted of a violation of the trademark law in New York City in regard to watches?" This referred to the twenty-year-old conviction about which defendant himself had testified on direct examination. Two of them had heard of it and two had not.

To four of these witnesses the prosecution also addressed the question the allowance of which, over defendant's objection, is claimed to be reversible error:

> "Did you ever hear that on October 11, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?"

None of the witnesses appears to have heard of this. The trial court asked counsel for the prosecution, out of presence of the jury, "Is it a fact according to the best information in your possession, that Michelson was arrested for receiving stolen goods?" Counsel replied that it was, and to support his good faith exhibited a paper record which defendant's counsel did not challenge.

The judge also on three occasions warned the jury, in terms that are not criticized, of the limited purpose for which this evidence was received.[3]

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[3] In ruling on the objection when the question was first asked, the Court said:

". . . I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evi-

Defendant-petitioner challenges the right of the prosecution so to cross-examine his character witnesses. The Court of Appeals held that it was permissible. The opinion, however, points out that the practice has been severely criticized and invites us, in one respect, to change the rule.[4] Serious and responsible criticism has

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dence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested. Is that clear?"

In overruling the second objection to the question the Court said:

"Again I say to the jury there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn't any such proof. All this witness has been asked is whether he had heard of that. There is nothing before you on that issue. Now would you base your decision on the case fairly in spite of the fact that that question has been asked? You would? All right."

The charge included the following:

"In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods. I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses."

[4] Footnote 8 to that court's opinion reads as follows:

"Wigmore, *Evidence* (3d ed. 1940) § 988, after noting that 'such inquiries are almost universally admitted,' not as 'impeachment by extrinsic testimony of particular acts of misconduct,' but as means of testing the character 'witness' grounds of knowledge,' continues

been aimed, however, not alone at the detail now questioned by the Court of Appeals but at common-law doctrine on the whole subject of proof of reputation or character.[5] It would not be possible to appraise the

with these comments: 'But the serious objection to them is that practically the above distinction—between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts—cannot be maintained in the mind of the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue. Moreover, these are not occurrences of possibility, but of daily practice. This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith.'

"Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction, the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, *i. e.*, that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial. See *Aiken* v. *People*, 183 Ill. 215, 55 N. E. 695; *cf. People* v. *Hannon*, 381 Ill. 206, 44 N. E. (2d) 923."

[5] A judge of long trial and appellate experience has uttered a warning which, in the opinion of the writer, we might well have heeded in determining whether to grant certiorari here:

". . . evidence of good character is to be used like any other, once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely

usefulness and propriety of this cross-examination without consideration of the unique practice concerning character testimony, of which such cross-examination is a minor part.[6]

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.[7] Not that the law invests the defendant with a presumption of good character, *Greer* v. *United States,* 245 U. S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.[8] The inquiry is not rejected because character is

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they are to use it sensibly. The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add." L. Hand in *Nash* v. *United States,* 54 F. 2d 1006, 1007.

In opening its cyclopedic review of authorities from many jurisdictions, Corpus Juris Secundum summarizes that the rules regulating proof of character "have been criticized as illogical, unscientific, and anomalous, explainable only as archaic survivals of compurgation or of states of legal development when the jury personally knew the facts on which their verdict was based." 32 C. J. S. Evidence § 433.

[6] See Maguire, *Evidence: Common Sense and Common Law* (1947). Compare pp. 203–209 and pp. 74–76.

[7] *Greer* v. *United States,* 245 U. S. 559; 1 Wigmore, *Evidence* (3d ed., 1940) § 57; 1 Wharton, *Criminal Evidence* (11th ed., 1935) § 330. This was not the earlier rule in English common law and is not now the rule in some civil law countries. 1 Wigmore, *Evidence* (3d ed., § 1940) § 193.

[8] This would be subject to some qualification, as when a prior crime is an element of the later offense; for example, at a trial for being an habitual criminal. There are also well-established exceptions

irrelevant;[9] on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.[10]

But this line of inquiry firmly denied to the State is opened to the defendant because character is relevant in resolving probabilities of guilt.[11] He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. *Edgington* v. *United States,* 164 U. S. 361.

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where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent intent as an element of the crime charged. See, *e. g., Fall* v. *United States,* 60 App. D. C. 124, 49 F. 2d 506, certiorari denied, 283 U. S. 867; *Hatem* v. *United States,* 42 F. 2d 40, certiorari denied, 282 U. S. 887; *Williamson* v. *United States,* 207 U. S. 425; *Allis* v. *United States,* 155 U. S. 117; *Wood* v. *United States,* 16 Pet. 342.

[9] As long ago as 1865, Chief Justice Cockburn said, "The truth is, this part of our law is an anomaly. Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution, go into evidence as to bad character." *Reg.* v. *Rowton,* 10 Cox's Criminal Cases 25, 29–30. And see 1 Wigmore, *Evidence* (3d ed., 1940) § 55.

[10] 1 Wigmore, *Evidence* (3d ed., 1940) § 57.

[11] 1 Wigmore, *Evidence* (3d ed., 1940) § 56; Underhill, *Criminal Evidence* (4th ed., 1935) § 165; 1 Wharton, *Criminal Evidence* (11th ed., 1935) §§ 330, 336.

When the defendant elects to initiate a character inquiry, another anomalous rule comes into play. Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay.[12] What commonly is called "character evidence" is only such when "character" is employed as a synonym for "reputation." The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits; nor can he testify that his own acquaintance, observation, and knowledge of defendant leads to his own independent opinion that defendant possesses a good general or specific character, inconsistent with commission of acts charged. The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood. This has been well described in a different connection as "the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect . . . . It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusion." Finch, J., in *Badger* v. *Badger,* 88 N. Y. 546, 552.

While courts have recognized logical grounds for criticism of this type of opinion-based-on-hearsay testimony,

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[12] 5 Wigmore, *Evidence* (3d ed., 1940) § 1609; Underhill, *Criminal Evidence* (4th ed., 1935) § 170; 1 Wharton, *Criminal Evidence* (11th ed., 1935) § 333.

it is said to be justified by "overwhelming considerations of practical convenience" in avoiding innumerable collateral issues which, if it were attempted to prove character by direct testimony, would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation. *People* v. *Van Gaasbeck,* 189 N. Y. 408, 419, 82 N. E. 718, 721.

Another paradox in this branch of the law of evidence is that the delicate and responsible task of compacting reputation hearsay into the "brief phrase of a verdict" is one of the few instances in which conclusions are accepted from a witness on a subject in which he is not an expert. However, the witness must qualify to give an opinion by showing such acquaintance with the defendant, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded. To require affirmative knowledge of the reputation may seem inconsistent with the latitude given to the witness to testify when all he can say of the reputation is that he has "heard nothing against defendant." This is permitted upon assumption that, if no ill is reported of one, his reputation must be good.[13] But this answer is accepted only from a witness whose knowledge of defendant's habitat and surroundings is intimate enough so that his failure to hear of any relevant ill repute is an assurance that no ugly rumors were about.[14]

Thus the law extends helpful but illogical options to a defendant. Experience taught a necessity that they

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[13] *People* v. *Van Gaasbeck,* 189 N. Y. 408, 420, 82 N. E. 718, 722. The law apparently ignores the existence of such human ciphers as Kipling's Tomlinson, of whom no ill is reported but no good can be recalled. They win seats with the righteous for character evidence purposes, however hard their lot in literature.

[14] *Id.;* 5 Wigmore, *Evidence* (3d ed., 1940) § 1614; Underhill, *Criminal Evidence* (4th ed., 1935) § 171; 1 Wharton, *Criminal Evidence* (11th ed., 1935) § 334.

be counterweighted with equally illogical conditions to keep the advantage from becoming an unfair and unreasonable one. The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses [15] to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion.[16] It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans.

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[15] 1 Wigmore, *Evidence* (3d ed., 1940) § 58; Underhill, *Criminal Evidence* (4th ed., 1935) § 167; 1 Wharton, *Criminal Evidence* (11th ed., 1935) § 330.

[16] A classic example in the books is a character witness in a trial for murder. She testified she grew up with defendant, knew his reputation for peace and quiet, and that it was good. On cross-examination she was asked if she had heard that the defendant had shot anybody and, if so, how many. She answered, "three or four," and gave the names of two but could not recall the names of the others. She still insisted, however, that he was of "good character." The jury seems to have valued her information more highly than her judgment, and on appeal from conviction the cross-examination was held proper. *People* v. *Laudiero*, 192 N. Y. 304, 309, 85 N. E. 132. See also *People* v. *Elliott*, 163 N. Y. 11, 57 N. E. 103.

To thus digress from evidence as to the offense to hear a contest as to the standing of the accused, at its best opens a tricky line of inquiry as to a shapeless and elusive subject matter. At its worst it opens a veritable Pandora's box of irresponsible gossip, innuendo and smear. In the frontier phase of our law's development, calling friends to vouch for defendant's good character, and its counterpart—calling the rivals and enemies of a witness to impeach him by testifying that his reputation for veracity was so bad that he was unworthy of belief on his oath—were favorite and frequent ways of converting an individual litigation into a community contest and a trial into a spectacle. Growth of urban conditions, where one may never know or hear the name of his next-door neighbor, have tended to limit the use of these techniques and to deprive them of weight with juries. The popularity of both procedures has subsided, but courts of last resort have sought to overcome danger that the true issues will be obscured and confused by investing the trial court with discretion to limit the number of such witnesses and to control cross-examination. Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject.[17]

Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse.

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[17] See, *e. g.*, *Mannix* v. *United States*, 140 F. 2d 250. It has been held that the question may not be hypothetical nor assume unproven facts and ask if they would affect the conclusion, *Little* v. *United States*, 93 F. 2d 401; *Pittman* v. *United States*, 42 F. 2d 793; *Filippelli* v. *United States*, 6 F. 2d 121; and that it may not be so asked as to detail evidence or circumstances of a crime of which defendant was accused. *People* v. *Marendi*, 213 N. Y. 600, 107 N. E. 1058. It

The trial judge was scrupulous to so guard it in the case before us. He took pains to ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box.[18]

The question permitted by the trial court, however, involves several features that may be worthy of comment. Its form invited hearsay; it asked about an arrest, not

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has been held error to use the question to get before the jury a particular derogatory newspaper article. *Sloan* v. *United States*, 31 F. 2d 902. The proof has been confined to general reputation and that among a limited group such as fellow employees in a particular building held inadmissible. *Williams* v. *United States*, 168 U. S. 382.

[18] This procedure was recommended by Wigmore. But analysis of his innovation emphasizes the way in which law on this subject has evolved from pragmatic considerations rather than from theoretical consistency. The relevant information that it is permissible to lay before the jury is talk or conversation about the defendant's being arrested. That is admissible whether or not an actual arrest had taken place; it might even be more significant of repute if his neighbors were ready to arrest him in rumor when the authorities were not in fact. But before this relevant and proper inquiry can be made, counsel must demonstrate privately to the court an irrelevant and possibly unprovable fact—the reality of arrest. From this permissible inquiry about reports of arrest, the jury is pretty certain to infer that defendant had in fact been arrested and to draw its own conclusions as to character from that fact. The Wigmore suggestion thus limits legally relevant inquiries to those based on legally irrelevant facts in order that the legally irrelevant conclusion which the jury probably will draw from the relevant questions will not be based on unsupported or untrue innuendo. It illustrates Judge Hand's suggestion that the system may work best when explained least. Yet, despite its theoretical paradoxes and deficiencies, we approve the procedure as calculated in practice to hold the inquiry within decent bounds.

a conviction, and for an offense not closely similar to the one on trial; and it concerned an occurrence many years past.

Since the whole inquiry, as we have pointed out, is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry, "Have you heard?" has general approval, and "Do you know?" is not allowed.[19]

A character witness may be cross-examined as to an arrest whether or not it culminated in a conviction, according to the overwhelming weight of authority.[20] This rule is sometimes confused with that which prohibits cross-examination to credibility by asking a witness whether he himself has been arrested.

Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness.

Arrest without more may nevertheless impair or cloud one's reputation. False arrest may do that. Even to be acquitted may damage one's good name if the community receives the verdict with a wink and chooses to remember defendant as one who ought to have been convicted. A conviction, on the other hand, may be accepted as a misfortune or an injustice, and even enhance the standing of one who mends his ways and lives it down. Reputation is the net balance of so many debits and credits that the law does not attach the finality to a conviction, when

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[19] See *Stewart* v. *United States,* 70 App. D. C. 101, 104 F. 2d 234; *Little* v. *United States,* 93 F. 2d 401; *Filippelli* v. *United States,* 6 F. 2d 121.

[20] See *Mannix* v. *United States,* 140 F. 2d 250; *Josey* v. *United States,* 77 U. S. App. D. C. 321, 135 F. 2d 809; *Spalitto* v. *United States,* 39 F. 2d 782, and authorities there cited.

the issue is reputation, that is given to it when the issue is the credibility of the convict.

The inquiry as to an arrest is permissible also because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation.

In this case the crime inquired about was receiving stolen goods; the trial was for bribery. The Court of Appeals thought this dissimilarity of offenses too great to sustain the inquiry in logic, though conceding that it is authorized by preponderance of authority. It asks us to substitute the Illinois rule which allows inquiry about arrest, but only for very closely similar if not identical charges, in place of the rule more generally adhered to in this country and in England.[21] We think the facts of this case show the proposal to be inexpedient.

The good character which the defendant had sought to establish was broader than the crime charged and included the traits of "honesty and truthfulness" and "being a law-abiding citizen." Possession of these characteristics would seem as incompatible with offering a bribe to a revenue agent as with receiving stolen goods. The crimes may be unlike, but both alike proceed from the same defects of character which the witnesses said this defendant was reputed not to exhibit. It is not only by comparison with the crime on trial but

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[21] The Supreme Court of Illinois, in considering its own rule which we are urged to adopt, recognized that "the rule adhered to in this State is not consistent with the great weight of authority in this country and in England." *People* v. *Hannon,* 381 Ill. 206, 209, 44 N. E. 2d 923. Authorities in all states are collected in 71 A. L. R. 1504.

by comparison with the reputation asserted that a court may judge whether the prior arrest should be made subject of inquiry. By this test the inquiry was permissible. It was proper cross-examination because reports of his arrest for receiving stolen goods, if admitted, would tend to weaken the assertion that he was known as an honest and law-abiding citizen. The cross-examination may take in as much ground as the testimony it is designed to verify. To hold otherwise would give defendant the benefit of testimony that he was honest and law-abiding in reputation when such might not be the fact; the refutation was founded on convictions equally persuasive though not for crimes exactly repeated in the present charge.

The inquiry here concerned an arrest twenty-seven years before the trial. Events a generation old are likely to be lived down and dropped from the present thought and talk of the community and to be absent from the knowledge of younger or more recent acquaintances. The court in its discretion may well exclude inquiry about rumors of an event so remote, unless recent misconduct revived them. But two of these witnesses dated their acquaintance with defendant as commencing thirty years before the trial. Defendant, on direct examination, voluntarily called attention to his conviction twenty years before. While the jury might conclude that a matter so old and indecisive as a 1920 arrest would shed little light on the present reputation and hence propensities of the defendant, we cannot say that, in the context of this evidence and in the absence of objection on this specific ground, its admission was an abuse of discretion.

We do not overlook or minimize the consideration that "the jury almost surely cannot comprehend the judge's limiting instruction," which disturbed the Court of Appeals. The refinements of the evidentiary rules on this

subject are such that even lawyers and judges, after study and reflection, often are confused, and surely jurors in the hurried and unfamiliar movement of a trial must find them almost unintelligible. However, limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects; for example, instructions that admissions of a co-defendant are to be limited to the question of his guilt and are not to be considered as evidence against other defendants, and instructions as to other problems in the trial of conspiracy charges. A defendant in such a case is powerless to prevent his cause from being irretrievably obscured and confused; but, in cases such as the one before us, the law foreclosed this whole confounding line of inquiry, unless defendant thought the net advantage from opening it up would be with him. Given this option, we think defendants in general and this defendant in particular have no valid complaint at the latitude which existing law allows to the prosecution to meet by cross-examination an issue voluntarily tendered by the defense. See *Greer* v. *United States,* 245 U. S. 559.

We end, as we began, with the observation that the law regulating the offering and testing of character testimony may merit many criticisms. England and some states have overhauled the practice by statute.[22] But the task of modernizing the long-standing rules on the subject is

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[22] Criminal Evidence Act, 61 & 62 Vict., c. 36. See also 51 L. Q. Rev. 443, for discussion of right to cross-examine about prior arrests. For review of English and state legislation, see 1 Wigmore, *Evidence* (3d ed., 1940) § 194, *et seq.* The Pennsylvania statute (Act of March 15, 1911, P. L. 20, § 1) discussed by Wigmore has been amended (Act of July 3, 1947, P. L. 1239, § 1, 19 PS § 711). The current statute and Pennsylvania practice were considered recently by the Superior Court of that state. *Commonwealth* v. *Hurt,* 163 Pa. Super. 232, 60 A. 2d 828.

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one of magnitude and difficulty which even those dedicated to law reform do not lightly undertake.[23]

The law of evidence relating to proof of reputation in criminal cases has developed almost entirely at the hands of state courts of last resort, which have such questions frequently before them. This Court, on the other hand, has contributed little to this or to any phase of the law of evidence, for the reason, among others, that it has had extremely rare occasion to decide such issues, as the paucity of citations in this opinion to our own writings attests. It is obvious that a court which can make only infrequent sallies into the field cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be.

We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.

The present suggestion is that we adopt for all federal courts a new rule as to cross-examination about prior arrest, adhered to by the courts of only one state and

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[23] The American Law Institute, in promulgating its "Model Code of Evidence," includes the comment, "Character, wherever used in these Rules, means disposition not reputation. It denotes what a person is, not what he is reputed to be. No rules are laid down as to proof of reputation, when reputation is a fact to be proved. When reputation is a material matter, it is provable in the same manner as is any other disputed fact." Rule 304. The latter sentence may seem an oversimplification in view of the decisions we have reviewed.

rejected elsewhere.[24] The confusion and error it would engender would seem too heavy a price to pay for an almost imperceptible logical improvement, if any, in a system which is justified, if at all, by accumulated judicial experience rather than abstract logic.[25]

The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

Despite the fact that my feelings run in the general direction of the views expressed by MR. JUSTICE RUTLEDGE in his dissent, I join the Court's opinion. I do so because I believe it to be unprofitable, on balance, for appellate courts to formulate rigid rules for the exclusion of evidence in courts of law that outside them would not be regarded as clearly irrelevant in the determination of issues. For well-understood reasons this Court's occasional ventures in formulating such rules hardly encourage confidence in denying to the federal trial courts a power of control over the allowable scope of cross-examination possessed by trial judges in practically all State courts. After all, such uniformity of rule in the conduct of trials is the crystallization of experience even when due allowance is made for the force of imitation. To reject such an impressive body of experience would imply a more dependable wisdom in a matter of this sort than I can claim.

To leave the District Courts of the United States the discretion given to them by this decision presupposes a

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[24] See note 21.

[25] It must not be overlooked that abuse of cross-examination to test credibility carries its own corrective. Authorities on practice caution the bar of the imprudence as well as the unprofessional nature of attacks on witnesses or defendants which are likely to be resented by the jury. Wellman, *Art of Cross-Examination* (1927) p. 167, *et seq.*

high standard of professional competence, good sense, fairness and courage on the part of the federal district judges. If the United States District Courts are not manned by judges of such qualities, appellate review, no matter how stringent, can do very little to make up for the lack of them.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE MURPHY joins, dissenting.

The Court's opinion candidly and interestingly points out the anomalous features characterizing the exclusion and admission of so-called character evidence in criminal cases. It also for the first time puts the stamp of the Court's approval upon the most anomalous and, what is more important, the most unfair stage in this evidentiary sequence.

There are three stages. The first denies the prosecution the right to attack the defendant's reputation as part of its case in chief, either by proof of bad general reputation or by proof of specific derogatory incidents disconnected from the one charged as the crime. The second permits the defendant, at his option, to prove by qualified witnesses that he bears a good general reputation or at least one not tarnished by ill-repute. The witness is forbidden, however, to go into particular incidents or details of the defendant's life and conduct. The witness, once qualified, can state only the general conclusion of the community concerning the defendant's character as the witness knows that reputation. The third stage comprehends the prosecution's rebuttal, and particularly the latitude of cross-examination to be allowed.

I do not agree that this whole body of law is anomalous, unless indeed all the law of evidence with its numerous rules of exclusion and exceptions to them is to be so regarded. Anomalies there are, no doubt with much room

for improvement. But here, if anywhere, the law is more largely the result of experience, of considerations of fairness and practicability developed through the centuries, than of any effort to construct a nicely logical, wholly consistent pattern of things. Imperfect and variable as the scheme has become in the application of specific rules, on the whole it represents the result of centuries of common-law growth in the seeking of English-speaking peoples for fair play in the trial of crime and other causes.

Moreover, I cannot agree that, in the sequence of the three stages relating to character evidence, the anomalous quality is equally present in each. In my judgment there is a vast difference in this respect between the rulings summarizing our experience in the first two stages and those affecting the third.

Regardless of all considerations of mere logical consistency, I should suppose there would be few now, whether lawyers or laymen, who would advocate change in the prevailing rules governing the first two stages of the sequence. In criminal causes especially, there are sound reasons basic to our system of criminal justice which justify initially excluding the Government from showing the defendant's bad general character or reputation.

The common law has not grown in the tradition of convicting a man and sending him to prison because he is generally a bad man or generally regarded as one. General bad character, much less general bad reputation, has not yet become a criminal offense in our scheme. Our whole tradition is that a man can be punished by criminal sanctions only for specific acts defined beforehand to be criminal, not for general misconduct or bearing a reputation for such misconduct.

That tradition lies at the heart of our criminal process. And it is the foundation of the rule of evidence which denies to the prosecution the right to show generally or by specific details that a defendant bears a bad general

estimate in his community. In the light of our fundamental conceptions of crime and of the criminal process, there is nothing anomalous in this exclusion. It is designed to restrain proof to the limits of the charge and to prevent conviction for one offense because perhaps others, or misconduct not amounting to crime at all, have been perpetrated or are reputed generally to lie at the defendant's door.

The rule which allows the defendant to prove his good standing by general reputation is, of course, a kind of exception to the hearsay rule of exclusion, though one may inquire how else could reputation be proved than by hearsay if it is to be proved at all. This indeed presents the substantial question. Apart from its long acceptance, *Edgington* v. *United States,* 164 U. S. 361, the rule allowing the evidence to come in rests on very different considerations from the one which forbids the Government to bring in proof of bad public character as part of its case in chief. The defendant's proof comes as rebuttal. It is subject to none of the dangers involving the possibility of conviction for generally bad conduct or general repute for it which would characterize permitting the prosecution initially to show bad general reputation. The basic reason for excluding the latter does not apply to the defendant's tender of proof.

On the positive side the rule is justified by the ancient law which pronounces that a good name is rather to be chosen than great riches. True, men of good general repute may not deserve it. Or they may slip and fall in particular situations. But by common experience this is more often the exception than the rule. Moreover, most often in close cases, where the proof leaves one in doubt, the evidence of general regard by one's fellows may be the weight which turns the scales of justice. It may indeed be sufficient to create a clear conviction of

innocence or to sow that reasonable doubt which our law requires to be overcome in all criminal cases before the verdict of guilty can be returned.

The apparent anomaly which excludes the prosecution's proof of bad character in the beginning but lets in the defendant's proof of good character is thus only apparent. It is part and parcel of our scheme which forbids conviction for other than specific acts criminal in character and which, in their trial, casts over the defendant the presumption of innocence until he is proved guilty beyond all reasonable doubt. To take away his right to bring in any substantial and pertinent proof bearing upon the existence of reasonable doubt is, so far, to nullify the rule requiring removal of that doubt. I reject the Court's intimation that these considerations have to some extent become obsolete or without substantial effects because we now live in cities more generally than formerly. They are basic parts of our plan, perhaps the more important to be observed because so much of our life now is urban.

But, for a variety of reasons, the law allows the defendant to prove no more than his general reputation, by witnesses qualified to report concerning it. He cannot show particular acts of virtue to offset the proof of his specific criminality on any theory that "By their fruits ye shall know them." Whether this be because such proof is irrelevant, is too distracting and time-consuming, is summarized in the general report of good character, or perhaps for all of these reasons, the rule is settled, and I think rightly, which restricts the proof to general repute.

Thus far, whatever the differences in logic, differences which as usual inhere in the premises from which thinking starts, there is no general disagreement or dissatisfaction in the results. All of the states and the federal judicial

system as well, approve them. No one would open the doors initially to the prosecution. No one would close them to the defense.

But the situation is different when we come to the third stage, that of the prosecution's rebuttal. Obviously rebuttal there should be, when the defendant has opened a line of inquiry closed to the prosecution and has sought to gain advantage by proof which it has had no chance to counteract. But the question of how the rebuttal shall be made presents the difficult problem.

There can be no sound objection, of course, to calling witnesses who will qualify as the witnesses for the defense are required to do, but who also will contradict their testimony. And the prosecution may inquire concerning the qualifications of the witnesses for the defense to speak concerning the defendant's general reputation. Thus far there is nothing to exceed the bounds of rebuttal or take the case out of the issues as made.

But these have not been the limits of proof and cross-examination. For, in the guise of "testing the standards of the witness" when he speaks to reputation, the door has been thrown wide open to trying the defendant's whole life, both in general reputation and in specific incident. What is worse, this is without opportunity for the defendant to rebut either the fact or the innuendo for which the evidence is tendered more generally than otherwise. Hardly any incident, however remote or derogatory, but can be drawn out by asking the witness who testifies to the defendant's good character, "Have you heard this" or "Have you heard that." And many incidents, wholly innocent in quality, can be turned by the prosecutor, through an inflection or tone, to cast aspersion upon the defendant by the mere asking of the question, without hope of affirmative response from the witness.

The dangers, the potential damage and prejudice to the defendant and his cause, have not been more clearly sum-

marized than in the excerpt from Wigmore's classic treatise, quoted in note 4 of the Court's opinion, *ante*, p. 473. His summary of the consequences produced by the rule bears repetition and greater emphasis. He said:

> "The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue." 3 Wigmore, Evidence (3d ed., 1940) § 988.

These consequences are not denied. But it is said two modes of protection are available to the accused. One is to refrain from opening the inquiry into his reputation. That answer would have weight if the rebuttal were limited to inquiry concerning the witness' opportunity for knowing the accused and his reputation and to producing contrary evidence by other witnesses of the same general sort as that which is refuted. But if the rule is sound which allows the accused to show his good repute and restricts him to that showing, it not only is anomalous, it is highly unjust, to exact, as the price for his doing so, throwing open to the prosecution the opportunity not only to rebut his proof but to call in question almost any specific act of his life or to insinuate without proving that he has committed other acts, leaving him no chance to reply. A fair rule either would afford this chance or would restrict the prosecution's counterproof in the same way his own is limited. The prevailing rule changes the whole character of the case, in a manner the rules applying to the two earlier stages seek to avoid.

Nor is it enough, in my judgment, to trust to the sound discretion of trial judges to protect the defendant against excesses of the prosecution. To do this effectively they need standards. None are provided under the Court's ruling; indeed it would be difficult to provide them except for each case and question as they might arise.

The facts in this case, it seems to me, show the inadequacy of any such general and largely unrestricted delegation. They demonstrate how far and how unfairly the prosecution may be allowed to go in bringing extraneous and immaterial matters to the jury's attention, with however a probable effect of prejudice. Petitioner himself had made a clean breast of his twenty-year-old conviction for violating the New York trademark laws. That fact of course was of some use for testing his character witnesses' standards for speaking to his general repute, although the conviction was so old that conceivably it could have but little weight on the accused's reputation in 1947.

Then the prosecution went back seven years further and inquired whether the witnesses had heard that petitioner was arrested "on October 11th, 1920" for receiving stolen goods. None of the witnesses had heard of this fact. The court solemnly instructed the jury that they were not to consider that the incident took place, that all that was happening was that the prosecutor was testing the witness' standard of opinion of the accused's reputation. This, after the court out of the jury's presence had required the prosecutor to make proof satisfactory to the court that the incident had taken place.

The very form of the question was itself notice of the fact to the jury. They well might assume, as men of common sense, that the court would not allow the question if the fact were only fiction. And why "on October 11th, 1920," rather than merely "in 1920" or "Have you ever heard of the defendant's being arrested, other than

for the trademark violation?" Why also "for receiving stolen goods"? In my opinion the only answers to these questions are, not that the prosecution was "testing the witness' standard of opinion of reputation," but that it was telling the jury what it could not prove directly and what the petitioner had no chance to deny, namely, that he had been so arrested; and thereby either insinuating that he had been convicted of the crime or leaving to the jury to guess that this had been the outcome. The question was a typical abuse arising from allowing this type of inquiry. It should have been excluded. There is no way to tell how much prejudice it produced.

Moreover, I do not think the mere question of knowledge of a prior arrest is one proper to be asked, even if inquiry as to clearly derogatory acts is to be permitted. Of course men take such an inquiry as reflecting upon the person arrested. But, for use in a criminal prosecution, I do not think they should be allowed to do so. The mere fact of a single arrest twenty-seven years before trial, without further showing of criminal proceedings or their outcome, whether acquittal or conviction, seldom could have substantial bearing upon one's present general reputation; indeed it is not *per se* a derogatory fact. But it is put in generally, and I think was put in evidence in this case, not to call in question the witness' standard of opinion but, by the very question, to give room for play of the jury's unguarded conjecture and prejudice. This is neither fair play nor *due* process. It is a perversion of the criminal process as we know it. For it permits what the rule applied in the first stage forbids, trial of the accused not only for general bad conduct or reputation but also for conjecture, gossip, innuendo and insinuation.

Accordingly, I think this judgment should be reversed. I also think the prevailing practice should be changed.

One judge of the Court of Appeals has suggested we do this by adopting the Illinois rule,[1] namely, by limiting inquiry concerning specific incidents to questions relating to prior offenses similar to that for which the defendant is on trial. Logically that rule is subject to the same objections as the generally prevailing one. But it has the practical merit of greatly reducing the scope and volume of allowable questions concerning specific acts, rumors, etc., with comparable reduction of innuendo, insinuation and gossip. My own preference and, I think, the only fair rule would be to foreclose the entire line of inquiry concerning specific incidents in the defendant's past, both on cross-examination and on new evidence in rebuttal. This would leave room for proper rebuttal without turning the defendant's trial for a specific offense into one for all his previous misconduct, criminal or other, and would put the prosecution on the same plane with the defendant in relation to the use of character evidence. This, it seems to me, is the only fair way to handle the matter.

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[1] See *People* v. *Hannon*, 381 Ill. 206, 211, for the most recent statement of the rule established by *Aiken* v. *People*, 183 Ill. 215; cf. *People* v. *Page*, 365 Ill. 524. In North Carolina a character witness may be asked on cross-examination about the "general reputation of the defendant as to particular vices or virtues," but not about rumors of specific acts of misconduct. *State* v. *Shepherd*, 220 N. C. 377, 379; *State* v. *Holly*, 155 N. C. 485, 492. The Arizona Supreme Court, which once followed the rule adopted by the Court today, *Smith* v. *State*, 22 Ariz. 229, more recently, in reversing a judgment because a character witness was cross-examined as to his knowledge of specific acts of misconduct, stated that cross-examination should be limited to questions concerning the source of the witness' knowledge of the accused's reputation and should not include questions concerning specific acts of misconduct. *Viliborghi* v. *State*, 45 Ariz. 275, 285.

FRAZIER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 44. Argued October 15, 1948.—Decided December 20, 1948.

1. Petitioner was convicted in a federal court in the District of Columbia for violating the Harrison Narcotics Act. In the circumstances of this case, he was not denied the trial "by an impartial jury" guaranteed by the Sixth Amendment, although the jury was composed entirely of employees of the Federal Government and one of them and the wife of another were employees of the Treasury Department, but not of its Bureau of Narcotics which administers and enforces the federal narcotics statutes. Pp. 498–514.
2. A motion to strike the entire panel for alleged irregularities in the method of its selection, which was not made until after an entire morning had been consumed in uncompleted efforts to select a jury and which was supported solely by counsel's unsworn statements, without any proof or offer of proof, was without merit. Pp. 503–504.
3. Given 10 arbitrary choices among 22 prospective jurors not disqualified for cause, of whom 13 were government employees and 9 privately engaged, petitioner knowingly rejected by peremptory challenges all 9 of the latter and accepted without challenge all but one of the former. *Held:* His objection to the resulting jury on the ground that it consisted entirely of government employees was not justified. Pp. 504–512.
4. In view of the D. C. Code (1940) § 11–1420, which removed (with specified exceptions) the previously existing disqualification of government employees for jury service in the District of Columbia in criminal and other cases to which the Government is a party, the mere fact of government employment is insufficient to disqualify a juror who is otherwise qualified. *United States* v. *Wood,* 299 U. S. 123. Pp. 508–512.
5. Where petitioner knew that the wife of one juror was employed by the Treasury and knew that another juror was a government employee but failed to inquire as to the exact nature of the latter's employment and failed to challenge either juror while the jury

was being selected, petitioner's challenge to these two jurors in a motion for a new trial was rightly overruled. Pp. 512–514.
82 U. S. App. D. C. 332, 163 F. 2d 817, affirmed.

Petitioner was convicted in the United States District Court for the District of Columbia of violating the Harrison Narcotics Act, 26 U. S. C. § 2553. The jury was composed entirely of employees of the Federal Government and one of them and the wife of another were employees of the Treasury Department, but not of its Bureau of Narcotics which administers and enforces the federal narcotics statutes. The Court of Appeals affirmed the conviction. 82 U. S. App. D. C. 332, 163 F. 2d 817. This Court granted certiorari. 333 U. S. 873. *Affirmed*, p. 514.

M. Edward Buckley, Jr. argued the cause for petitioner. With him on the brief was *Milton Conn.*

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Robert S. Erdahl* and *Josephine H. Klein.*

Mr. Justice Rutledge delivered the opinion of the Court.

Petitioner's primary complaint is that he has been denied the trial "by an impartial jury" which the Sixth Amendment guarantees. He was convicted of violating the Harrison Narcotics Act,[1] by a jury composed entirely of employees of the Federal Government. One juror,

[1] 26 U. S. C. § 2553. The indictment charged, substantially in the statutory language, that petitioner knowingly, wilfully, unlawfully and feloniously did "purchase, sell, dispense, and distribute" certain narcotic drugs "not then and there, in or from, the original stamped package."

Moore, and the wife of another, Root, were employed in the office of the Secretary of the Treasury, who is charged by law with responsibility for administering and enforcing the federal narcotics statutes.[2] As against objections based on these facts and other matters, the Court of Appeals affirmed petitioner's conviction and sentence. 82 U. S. App. D. C. 332, 163 F. 2d 817. He has sought relief here by application for certiorari limited to the issues relating to the jury's selection and composition. To review the determination made of them by the Court of Appeals we granted certiorari. 333 U. S. 873.

Petitioner's objections comprehend an attack upon the entire panel of prospective jurors, made during the course of *voir dire* examination, in an effort to have the panel stricken; a challenge to the jury as finally constituted, after petitioner had exhausted his ten peremptory challenges, *voir dire* examination had been completed, and the twelve jurors who tried the case had been qualified; and, either separately or in conjunction with his other objections,[3] a claim of reversible error on account of the

[2] Pursuant to 26 U. S. C. § 2606 the Secretary has delegated to the Commissioner of Narcotics "the investigation, detection and prevention of violations of the Federal narcotic and marihuana laws." 21 C. F. R., 1946 Supp., § 206.1. The Bureau of Narcotics, created within the Treasury Department, 5 U. S. C. § 282, is subject to the Secretary's "general supervision and direction," 21 C. F. R., 1946 Supp., § 206.3, and its decisions are subject to review by him. 5 U. S. C. § 282c. There were 87,830 employees in the Treasury Department as of September 30, 1948, of whom 19,645 were employed in the District of Columbia. Monthly Report of Employment, Executive Branch of the Federal Government, U. S. Civ. Serv. Comm'n, September, 1948, Table V. Published figures are not available to show the number of these employed by the Narcotics Bureau, but obviously in view of the number and diversity of the Treasury Department's functions they must have comprised only a comparatively small fraction of the total.

[3] See Part III *infra*.

inclusion of Moore and Root as jurors. An adequate understanding of the issues thus raised requires a condensed statement of the proceedings followed in the District Court in the selection of the jury.

Pursuant to customary practice, those proceedings began with the seating in the box of twelve prospective jurors for purposes of examination on *voir dire*. These twelve had been chosen previously, in accordance with prevailing practice, from jury lists maintained to supply grand and petit juries for all divisions of the District Court. Cf. D. C. Code (1940) § 11–1401, *et seq.* There is no claim that those lists were improperly made up. The usual preliminary examination began and continued until the noon recess, as is later noted, with counsel raising no question concerning the constitution of the lists or the panel.

Petitioner inquired, among other things, how many were Government employees. Five of the original twelve indicated they were. One of these was excused by the court. The other four, including Moore, remained unchallenged and served on the jury. The seven remaining veniremen, including two housewives, were engaged in private occupations. All seven were challenged peremptorily by petitioner.

To replace them and the one excused by the court, others including Root were called from time to time, and were examined in substantially the same manner as the original twelve. Altogether they numbered thirteen, nine Government employees, two in private employment, and two the nature of whose work does not appear. Of the latter, one was excused by the court and the other peremptorily challenged by the prosecution. Petitioner peremptorily challenged both of those in private employment and one of the nine in Government service. This exhausted petitioner's peremptory challenges and left

eight unchallenged Government employees to join the four like ones originally called in composing the twelve who made up the jury as finally chosen.[4]

The process of selection was interrupted shortly before noon, when petitioner still had two unused peremptory challenges, by a shortage of veniremen. Anticipating that others would be available later in the day, the court adjourned until 2:30 p. m. On its reconvening, additional prospective jurors were available. But petitioner then moved for the first time to strike the entire panel for alleged irregularity in the method used for selecting it, asserted to have been discovered by counsel through "a little investigation" during the noon recess. The court denied the motion, with leave to renew the objection in a motion for a new trial if petitioner should be convicted.[5] The material part of the colloquy relating to these proceedings and disclosing the grounds for the motion and its denial is set forth in the margin.[6]

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[4] In summary, twenty-five prospective jurors were examined. Of these one was peremptorily challenged by the prosecution and two were excused by the court for cause. Of the remaining twenty-two, thirteen were in Government work, nine privately employed. Petitioner peremptorily challenged the nine and one Government employee, thus exhausting his peremptory challenges. In this manner the jury composed wholly of federal employees resulted. Prior to his trial petitioner made no individual challenge to any of the twelve who constituted the jury as finally selected. They included Moore and Root.

[5] The objection was renewed in petitioner's motions in arrest of judgment and for a new trial, and was denied in each instance.

[6] "Mr. BUCKLEY. If your Honor please, I have made a little investigation of the impaneling or selection of this panel here as well as selection of the other panels sitting this month, and I most respectfully submit that the method and procedure used in selecting is irregular, and I am going to move to strike this whole panel, the reason being this: that from the inquiries I have made, there were about five hundred or five hundred and a few jurors

Petitioner then exercised his two remaining peremptory challenges, after which he inquired of the twelve jurors then impaneled how many were employed by the Government. When all indicated they were, petitioner challenged the jury as impaneled for cause. The challenge and the court's ruling in denial of it appear below.[7] Although counsel sought to intermingle with this challenge

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subpenaed—that is, individually subpenaed to appear here—from which they selected a sufficient number of jurors here.

"If there were five hundred, they were divided into two groups, two hundred fifty for one court and two hundred fifty for another court, and of the two hundred fifty for each court, they were asked how many of those two hundred fifty did not desire to serve as jurors, to raise their hands, so those who raised their hands were told to step to one side, and out of the remaining number that were left they picked the jurors, and the remaining number that were left consisted mostly of Government employees and housewives, and unemployed. There are only a few unemployed.

"I know Your Honor has read this case in the Supreme Court, *Thiel* v. *Southern Pacific Company*. This is not a proper cross-section.

"The COURT. The *Thiel* case holds that it must be shown that there was a systematic attempt to exclude a certain type or group of persons. . . . That is what that case holds, and that is not the situation here."

[7] "Mr. BUCKLEY. If Your Honor please, with reference to the motion which I made a while ago, moving to strike the whole panel, I now find myself in this position. I have exhausted my ten challenges.

"In selecting these different panels on the first Tuesday of the month, the Clerk says to the five hundred or two hundred fifty, whichever it may be, individuals who are summoned to appear here, from which to pick the juries, 'All those who do not desire to serve, step to one side.'

"That leaves a batch of Government employees and housewives.

"Now, I have exhausted my ten challenges, and here I have twelve Government jurors who are to decide this defendant's case, which is a violation of the Federal statute, being brought in a Federal Court, prosecuted by a Federal prosecutor, and the case is presented by

the one previously made to the panel,[8] the two are distinct attacks and must be treated separately.

I. *The method of selecting the panel.*—Apart from the objection that this challenge came too late, cf. *Agnew* v. *United States,* 165 U. S. 36, it is without merit. It consists exclusively of counsel's statements, unsworn and unsupported by any proof or offer of proof. The Government did not explicitly deny those statements. But it was under no necessity to do so. The burden was upon the petitioner as moving party "to introduce, or to offer, distinct evidence in support of the motion." *Glasser* v. *United States,* 315 U. S. 60, 87. See also *Smith* v. *Mississippi,* 162 U. S. 592; *Tarrance* v. *Florida,* 188 U. S. 519; *Martin* v. *Texas,* 200 U. S. 316; cf. *Brownfield* v. *South Carolina,* 189 U. S. 426.

Of itself this failure in tender of proof would require denial of the motion. But even if proof had been made or offered there would have been no showing sufficient to require contrary action. The statements, if treated as allegations, comprehended in substance but two things. One was the very brief statement of facts relating to the procedure followed, namely, the subpoenaing of about five hundred jurors, their equal division for assignment to two branches of the court, and that those in each group who did not wish to serve were "told to step to one side." This was all in the way of facts. From them followed counsel's vague and general conclusion that the

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Federal agents. I submit there is reason to challenge these people for cause.

"The COURT. I will deny the motion and request at this time that you take it up later, in a motion after the verdict, if you think it is sound. I do not believe your motion is sound. Chance has resulted in this jury panel of twelve being composed of Government employees, but the jury list from which they by chance were selected is a mixture of Government employees and private employees."

[8] See note 7; cf. note 6.

remaining number, from which it was said jurors were picked, "consisted mostly of Government employees and housewives, and unemployed." Counsel then urged that this furnished basis for applying the decision in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, as not affording "a proper cross-section."

The trial court rightly held the *Thiel* case inapplicable, for the reasons that it requires a showing of systematic exclusion or attempt to exclude from the panel a particular occupational group or groups otherwise eligible for jury service, and the statements and conclusions of counsel here disclosed no such attempt. Beyond this, moreover, it seems highly doubtful that the facts set forth in the statement, if proved, would constitute any irregularity. Nothing is stated concerning the numbers who stepped to one side, their occupational classifications, whether they were excused or, if any, how many, by whom or for what cause. For all one could know from the statement, those stepping to one side may have included but one in ten, and of these, half or more may have been held for jury service after claiming exemption or seeking excuse. The facts stated, therefore, taken in the light of pertinent facts omitted, lay no foundation whatever for counsel's conclusions, inferentially that jurors were selected only from those not standing aside, and explicitly that the remaining number "consisted mostly of Government employees and housewives, and unemployed." The statement was obviously insufficient to lay any foundation for valid attack upon the method followed in selecting the panel.

II. *Composition of the jury.*—The essence of this attack consists in counsel's statement, "Now, I have exhausted my ten challenges, and here I have twelve Government jurors who are to decide this defendant's case, which is a violation of the Federal statute, being

brought in a Federal Court, prosecuted by a Federal prosecutor, and the case is presented by Federal agents." [9] So put, the challenge has the sound of plausibility. Possibly it would have more of the substance of it if in this case it did not appear that petitioner himself was responsible, by deliberate choice, for the jury's final composition.

Given ten arbitrary choices among twenty-two prospective jurors not disqualified for cause, of whom thirteen were Government employees and nine privately engaged, he knowingly, of his own right, rejected nine of the latter and with knowledge or the full opportunity to secure it accepted without challenge all but one of the former. It would seem that ordinarily one anxious to secure a jury representative of both private and public employment in a community like Washington,[10] and particularly to avoid overweighting the jury with Government employees, well might have found a more effective way of utilizing his peremptory challenges to achieve those objectives.

The right of peremptory challenge is given, of course, to be exercised in the party's sole discretion and was so exercised here. We do not question petitioner's privilege to utilize his peremptory challenges as he did. But the right is given in aid of the party's interest to secure a fair and impartial jury, not for creating ground to claim partiality which but for its exercise would not exist.[11]

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[9] See note 7.

[10] See note 17 *infra* and text.

[11] The right is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guaranties of "an impartial jury" and a fair trial. *Stilson* v. *United States*, 250 U. S. 583, 586, quoted in *United States* v. *Wood*, 299 U. S. 123, 145.

Except in cases of treason and other capital offenses, no right to peremptory challenges existed in federal criminal trials until the Act of June 8, 1872, 17 Stat. 282, Rev. Stat. § 819, unless a rule of the particular federal court made applicable a provision of state law

It does not follow that by using the right as he pleases, he obtains the further one to repudiate the consequences of his own choice.

Here petitioner was given a fairly and lawfully selected panel. From it all disqualified for cause were excused. The fully qualified jurors remaining were fairly evenly distributed among persons publicly and privately employed. For reasons entirely his own, petitioner chose to eliminate the latter and retain the former. This was a deliberate choice, not an uninformed one. We need draw no conclusion concerning whether or not it was made for the purpose of creating the basis now asserted for objecting to the jury's composition.[12] Rather we must take it as having been made exactly for the purpose for which the right was given, namely, to afford petitioner an opportunity beyond the minimum requirements of fair selection to express an arbitrary preference among jurors properly selected and fully qualified to sit in judgment on his case. Cf. note 11. Any other view would convict him of abusing his privilege. This we are unwilling to do.

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allowing peremptory challenges in noncapital cases. Act of April 30, 1790, § 30, 1 Stat. 112, 119; *United States* v. *Randall,* Fed. Cas. No. 16,118; *United States* v. *Cottingham,* Fed. Cas. No. 14,872; *United States* v. *McPherson,* Fed. Cas. No. 15,703; *United States* v. *Krouse,* Fed. Cas. No. 15,544. (However, the right of peremptory challenge in capital cases, which existed at common law, has been spoken of as "one of the most important of the rights secured to the accused." *Pointer* v. *United States,* 151 U. S. 396, 408; see also *Lewis* v. *United States,* 146 U. S. 370, 376.)

In noncapital cases, such as this, the privilege affords protection additional to constitutional guaranties, to be had exclusively at the party's option. If no such privilege had been given in the District of Columbia, the normal and valid course of selection in this case would have produced a jury composed both of federal employees and persons engaged in private occupations; in other words, would have made it impossible for petitioner to raise his objection to the jury's composition.

[12] See note 4; also note 11 and text.

By the same token we are not willing to join in repudiating the consequences of his own selection. We take petitioner at his word as expressed by his repeated choices. The fact that he exercised his peremptory challenges as he did, so frequently and consistently to eliminate privately employed jurors and retain only Government employees, hardly can be said to give cause for him to claim overweighting of the jury with Government employees. There was no defect of the panel in this respect. Nor is there any claim or basis for one that the prosecution utilized its peremptory challenges to bring about a jury constituted only of them. It would be going very far to say that in the circumstances shown by this record petitioner was deprived, either in law or in fact, of an impartial jury or indeed of one fairly representative of the community. If deprivation there was, even in the latter sense,[13] it was the result of his own choice, not of imperfection in the choices tendered him by law or in the procedures of selection afforded.

In ruling upon petitioner's objection the trial judge assessed the situation as follows: "Chance has resulted in this jury panel of twelve being composed of Government employees, but the jury list from which they by chance were selected is a mixture of Government employees and private employees."[14] Even in this view of what took place, petitioner has no cause to complain. The well-settled rule is that, given a lawfully selected panel, free from any taint of invalid exclusions or procedures in selection and from which all disqualified for cause have been excused, no cause for complaint arises merely from the fact that the jury finally chosen happens itself not to be representative of the panel or indeed of

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[13] The assumption is not meant to imply that such a deprivation alone would constitute grounds for challenge to the jury. See text and authorities cited *infra* at note 15.

[14] See note 7.

the community.[15] There is, under such circumstances, no right to any particular composition or group representation on the jury.[16]

Finally, in this phase of the case, *United States* v. *Wood,* 299 U. S. 123, goes far toward precluding petitioner's objection. That decision sustained the Act of Congress of August 22, 1935, now D. C. Code (1940) § 11–1420, removing (with specified exceptions) the disqualification of Government employees previously existing in the District of Columbia for jury service in criminal and other cases to which the Government was a party. The disqualification had arisen in 1908 by virtue of the decision, made on common-law grounds, in *Crawford* v. *United States,* 212 U. S. 183.

Owing to the large and increasing proportion of Government to private employees in the District, the effect of the *Crawford* decision had been by 1935 to create difficulties in securing properly qualified jurors. To meet this situation the 1935 statute was adopted.[17] It con-

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[15] *Ruthenberg* v. *United States,* 245 U. S. 480; *Thomas* v. *Texas,* 212 U. S. 278, 282; *Virginia* v. *Rives,* 100 U. S. 313, 322–323; *Higgins* v. *United States,* 81 U. S. App. D. C. 371, 372, 160 F. 2d 222, 223; see *Fay* v. *New York,* 332 U. S. 261, 284–285; *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 220; cf. *Akins* v. *Texas,* 325 U. S. 398, 403–404.

[16] *Ibid.*

[17] See *United States* v. *Wood,* 299 U. S. at 132–133, quoting from the opinion of the Court of Appeals, 65 App. D. C. 330, 332, 83 F. 2d 587, 589. See also H. R. Rep. No. 1421, Sen. Rep. No. 1297, 74th Cong., 1st Sess.; 79 Cong. Rec. 13,401, relating to the bill which became the Act of Congress of August 22, 1935, now D. C. Code (1940) § 11–1420. The Government's brief in the *Wood* case, relying upon figures assembled from various official sources, indicated that of the probable 353,949 persons otherwise available for jury service in the District of Columbia as of 1935, some 156,874, or 44.3 per cent, were disqualified to serve either by virtue of exemption or by the mere fact of employment by or receipt of benefits from the Government, under the ruling in the *Crawford* case.

tinued specified exemptions previously existing, including all executive and judicial officers of the United States, and then directed in presently material part: "All other persons, otherwise qualified according to law whether employed in the service of the government of the United States or of the District of Columbia . . . shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service . . . ." D. C. Code (1940) § 11–1420.

The *Wood* case was a criminal prosecution for theft from a private corporation. Three of the jurors were federal employees, challenged for cause on that ground. In sustaining the conviction and the statute the Court first held that Congress had not "undertaken to preclude the ascertainment of actual bias," and that the question in issue was limited to "implied bias, a bias attributable in law to the prospective juror regardless of actual partiality." 299 U. S. at 133, 134. As to this the Court said of the statute, "The enactment itself is tantamount to a legislative declaration that the prior disqualification [under the *Crawford* ruling] was artificial and not necessary to secure impartiality." *Id.* at 148–149. By way of sustaining the legislative judgment, the Court added on its own account:

> "In criminal prosecutions the Government is acting simply as the instrument of the public in enforcing penal laws for the protection of society. In that enforcement all citizens are interested. It is difficult to see why a governmental employee, merely by virtue of his employment, is interested in that enforcement either more or less than any good citizen is or should be. . . . We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular

cases, rests on an assumption without any rational foundation." *Ibid.*

The Court was not confronted in the *Wood* case with the exact situation we have here, namely, that all of the jurors finally selected were Government employees. But the purport of the decision was that the mere fact of Government employment, without more, would be insufficient under the statute's mandate to disqualify a juror. Implicit in this was the conception that, insofar as that fact alone is or may be effective, Government employees and persons privately engaged were put upon the same basis without any limitation, explicit or implied, upon the number who might be selected as jurors from either group.[18] The effect of these rulings, we think, was to make Government employees subject, as are all other persons and in the same manner, to challenge for "actual bias" [19] and under all ordinary circumstances only to such challenge. In that view, absent any basis for such challenge, we do not see how a right to challenge the panel as a

[18] Given of course a panel and jury otherwise selected in accordance with law. Since the *Wood* case the Court of Appeals for the District of Columbia has held that juries including four and nine Government employees were not inherently defective. *Great Atlantic & Pacific Tea Co.* v. *District of Columbia,* 67 App. D. C. 30, 89 F. 2d 502; *Higgins* v. *United States,* 81 U. S. App. D. C. 371, 160 F. 2d 222. The Court of Appeals for the Fifth Circuit has held that a Canal Zone jury composed entirely of persons who were either employees or tenants of the Government was not improperly constituted. *Schackow* v. *Government of the Canal Zone,* 108 F. 2d 625.

[19] The phrase "actual bias" is used in this opinion as it was in the *Wood* case. The *Wood* opinion stated: "The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law." 299 U. S. at 133. It later pointed out that "Challenges at common law were to the array, that is, with respect to the constitution of the panel, or to the polls, for disqualification of a juror. Challenges to the polls were either 'principal' or 'to the favor,' the former being upon

whole can arise from the mere fact that the jury chosen by proper procedures from a properly selected panel turns out to be composed wholly of Government employees or, *a fortiori,* of persons in private employment.

The opinion in the *Wood* case, however, was very careful to stress more than once that the Sixth Amendment prescribes no specific tests for determining impartiality. 299 U. S. at 133. It afforded further assurances, beyond those given by Art. III, § 2, cl. 3, relating to trial by jury, in respect to speed, publicity, impartiality, etc. *Id.* at 142. But it did not require in these respects "the particular forms and procedure used at common law." P. 143. The opinion emphasized especially that "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." Pp. 145–146.

This seems to contemplate implicitly that in each case a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality, even though that basis might possibly arise through the working of chance or other lawful factors wholly within the framework of proper procedures for selecting the panel and choosing the jury from it. Such a situation could arise, if at all, only in the rarest and most extraordinary combination of cir-

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grounds of absolute disqualification, the latter for actual bias." Pp. 134–135. As appears from the portion of the opinion quoted in the text *infra* at note 23, the Court regarded "actual bias" or challenge "to the favor" as including not only prejudice in the subjective sense but also such as might be thought implicitly to arise "in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise."

cumstances. But even if that possibility is taken as conceded, for the reasons we have already stated this case presents no such problem.

III. *The challenges to Jurors Moore and Root.*—Considered as independent and individual challenges for "actual bias," [20] the objections to these jurors come too late. Moore was a Treasury messenger. Root's wife was a Treasury employee. Petitioner's counsel knew of the employment of Root's wife and that Moore was a federal employee. He did not inquire where Moore was employed, but could have known his employment's exact nature.[21] It does not appear that either Moore or Root's wife was connected with the Bureau of Narcotics or had any duty even remotely relating to its functions or those of the Secretary in relation to them.[22]

As respects challenge for "actual bias," the *Wood* opinion was careful to put Government employees on the same basis as prospective jurors privately employed. It stated:

> "All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror. In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular

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[20] Cf. text *supra* at notes 3 and 8.

[21] Apart from petitioner's opportunity for discovery by specific inquiry, lists of jury panels, showing the name, age, address, and occupation of each member are prepared in the criminal division of the District Court for the District of Columbia and are available to counsel before trial on request.

[22] Cf. note 2.

> governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him." [23]

Petitioner challenged neither Moore nor Root for "actual bias," though afforded the fullest opportunity legally and factually for doing so. After accepting them before trial, he could not challenge them successfully in a motion for a new trial. *Queen* v. *Hepburn,* 7 Cranch 290, 297; *Raub* v. *Carpenter,* 187 U. S. 159; cf. *United States* v. *Gale,* 109 U. S. 65. See *Kohl* v. *Lehlback,* 160 U. S. 293, 299–302. Whether or not employment in the Treasury outside the Narcotics Bureau would constitute ground for challenge for "actual bias," [24] such employment in the connections disclosed here affecting Moore and Root was not so obvious a disqualification or so inherently prejudicial as a matter of law, in the absence of any challenge to them before trial, as to require the court of its own motion or on petitioner's suggestion afterward to set the verdict aside and grant a new trial.

The challenge to Moore and Root stands no better if considered, not as a belated individual challenge for "actual bias" to each, but as additional support or buttressing for the challenge to the composition of the jury

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[23] 299 U. S. at 133–134.

[24] In *United States* v. *Wood* the Court, speaking of the *Crawford* case, said: "It will be observed that the employment was in the very department to the affairs of which the alleged conspiracy related. But the decision took a broader range and did not rest upon that possible distinction." 299 U. S. at 140. It is at least highly doubtful that an employment having no more relationship to the particular governmental activity involved in the prosecution than did that of Moore in this case, cf. note 2, or that of Root's wife, would give ground for challenge for "actual bias," although coming under the same ultimate departmental supervision, even though if timely called to the court's attention the circumstance might afford basis for the court, in an excess of caution, to excuse the venireman.

as a whole. Apart from the fact that the two sorts of challenge are distinct and are therefore to be dealt with separately, the challenge to the composition of the jury as made to the trial court and as ruled upon by it, made no special reference to either Moore or Root or the particular bases for objection now raised to them.[25] Those references, so far as is shown by the record, first appeared in the assignments of error made by petitioner in the Court of Appeals. They therefore came too late, even if they could be considered as forming part of the challenge to the jury's composition or as adding anything of weight to that challenge.

Whether the matter is considered technically or on the broader, nontechnical basis of impartiality as a state of mind, petitioner has shown no ground for believing that he did not receive a trial "by an impartial jury" such as the Sixth Amendment assured him.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE JACKSON, dissenting.

On one proposition I should expect trial lawyers to be nearly unanimous: that a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury. A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts.

Were the employer an individual, a railroad, an industrial concern, or even a state, I think bias would more readily be implied; but its existence would be no more probable. This criminal trial was an adversary proceeding, with the Government both an actual and nominal

[25] See note 7.

litigant. It was the patron and benefactor of the whole jury, plus one juror's wife for good measure. At the same time that it made its plea to them to convict, it had the upper hand of every one of them in matters such as pay and promotion. Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to ". . . crook the pregnant hinges of the knee where thrift may follow fawning." So I reject as spurious any view that government employment differs from all other employment in creating no psychological pressure of dependency or interest in gaining favor, which might tend to predetermine issues in the interest of the party which has complete mastery over the juror's ambition and position. But even if this suspicion can be dismissed by the Court as a mere phantasy, it cannot deny that such a jury has a one-sided

outlook on problems before it and an appearance of government leverage which is itself a blemish on the name of justice in the District of Columbia.

Because this semblance of partiality reflects on the courts, even if it does not prejudice the defendant in a particular case, I am not disposed to labor the argument as to whether counsel for this defendant did all that he might or should have done by way of objection. He did protest as soon as it was apparent what was happening to him, and that seems to me sufficient in face of adverse rulings. But even if defendant's objection were belated or technically defective, I still think the court deserves and should require a more neutral jury for its own appearances, even if defendant does not deserve and cannot demand one.

The cause of overloading this jury with persons beholden to the Government is no mystery and no accident. It is due to a defect in a system which will continue to operate in the same direction so long as the same practice is followed. While counsel did not prove it under oath, he stated it for the record and neither the District Attorney nor the learned Trial Judge, both of whom must have known the facts, denied or questioned his statement or asked him for better evidence. That defect is this: when the panel of jurors was drawn, the court appears to have asked all those who did not wish to serve to step aside, and they were excused from serving.

This amiable concession in some jurisdictions might produce no distortion of the composition of the panel; but it is certain to do just that in the District of Columbia because of the dual standard and dubious method of jury compensation. The nongovernment juror receives $4 per day,[1] which under present conditions is inadequate to be compensatory to nearly every gainfully employed

[1] D. C. Code, title 11, § 1513 (1940).

juror. But the government employee is not paid specially; instead, he is given leave from his government work with full pay while serving on the jury.[2] The latter class are thus induced to jury service by protection against any financial loss, while the former are subjected to considerable disadvantage.

This condition makes it obvious that, if jury service is put on virtually a voluntary basis and qualified persons are allowed to decline jury service at their own option, the panel will become loaded with government employees. If this undue concentration of such jurors were accomplished by any device which excluded nongovernment jurors, it unquestionably would be condemned not only by reason of but even without resort to the doctrine that prevailed in *Ballard* v. *United States,* 329 U. S. 187; *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217; and *Glasser* v. *United States,* 315 U. S. 60.

Is the result more lawful when it is accomplished by letting one class exclude themselves, stimulated to do so by the incentive of such a dual system of compensation?

Of course, the defendant and the prosecution each have peremptory challenges, ten in this case, which enable each without assigning any cause to excuse that number whom they do not wish to have sit. This defendant used many of his challenges to excuse talesmen not employed by the Government and it is hinted that he may have packed this jury against himself. The learned Trial Judge made no such suggestion, however, and he would be better able than we to detect such tactics. He blamed the situation on "chance." But the fickle goddess is hardly to be blamed for the result when it can be seen that the cards were stacked from the beginning. This was plainly the case when we contrast unequal advantages which the two parties could get from their equal numbers of challenges.

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[2] D. C. Code, title 11, §§ 1421–23 (1940).

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The Government was confronted by no occasion to use any of its peremptory challenges to get rid of its adversary's employees. The defendant was. But if the defendant should try to use his challenges to excuse employees of the Government, he would dismiss one only to incur a probability of getting another. If he exhausted his challenges in this effort, it would still be futile, for no one claims he had enough to displace them all. It might not be wise tactics to show suspicion or disapproval of a class some of whom will have to sit anyway. Moreover, if he used his challenges as far as they would go to dislodge government servants, it would leave him helpless to challenge any of the nongovernment jurors, for which challenge he might have good reason.

The disadvantage of defendant as to talesmen from government ranks is more apparent but not more prejudicial than with talesmen from other walks of life. Whatever reason he may have had for excusing such a one, the price he would probably have had to pay for using his challenge was to have one government employee take another's place. The Government could vacate the seat of a nongovernment talesman with no such unwelcome results. The short of the thing is: in no case where the court has intervened to use its supervisory power to revise federal jury systems has there been any result so consistently and inevitably prejudicial to one of the litigants as here, under our noses. *Ballard* v. *United States,* 329 U. S. 187; *Thiel* v. *Southern Pacific,* 328 U. S. 217; *Glasser* v. *United States,* 315 U. S. 60. And in cases where a strong minority of the Court has wanted to go so far as to upset a state jury system, as offensive to fundamental considerations of justice spelled out from the due process clause of the Fourteenth Amendment, there has been no such brazen unfairness in actual practice. *Moore* v. *New York,* 333 U. S. 565; *Fay* v. *New York,* 332 U. S. 261.

The precedent of *United States* v. *Wood,* 299 U. S. 123, on which the Court leans heavily, is a weak crutch. That decision held only that the absolute disqualification of any federal employee, which had been declared in *Crawford* v. *United States,* 212 U. S. 183, could constitutionally be removed by the Congress. In the case the Court was considering only three out of the twelve were by chance government beneficiaries and the Court was not confronted with such a systematic distortion of the jury as was at work here. It held that, individually, they were not subject to challenge for cause; that is, they were not excusable by the court merely because they were government employees. But to hold that one or a few government employees may sit by chance is no precedent for holding that they may fill all of the chairs by a system of retiring everyone else. Furthermore, that opinion emphasized that the prosecution in that case was for larceny from a private corporation. That was not an offense against the Federal Government as such, except as it has responsibility for prosecuting crimes in the District that in the state would be a matter of no federal concern or even jurisdiction. But the prosecution before us is not for an offense of a private aspect; it is an offense against no one except federal government policy; and the Secretary of the Treasury, in whose own office one of these jurors was employed, has exclusive and nationwide responsibility for enforcement of the law involved.

If we admit every fact, premise, argument and conclusion stated in the Court's opinion, it still leaves this one situation unexplained and unjustified. In federal courts, over which we have supervisory power, sitting almost within a stone's throw of where we sit, a system is in operation which has produced and is likely again and again to produce what disinterested persons are likely to regard as a packed jury. Approval of it, after all that

has been written of late on the subject of juries, makes these lofty pronouncements sound a little hollow.

I would reverse this rather insignificant conviction and end this system before it builds up into a scandalous necessity for reversal of some really significant conviction.

MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join in this opinion.

CORAY, ANCILLARY ADMINISTRATOR, *v.* SOUTHERN PACIFIC CO.

CERTIORARI TO THE SUPREME COURT OF UTAH.

No. 54. Argued December 6–7, 1948.—Decided January 3, 1949.

In a suit under the Federal Safety Appliance and Federal Employers' Liability Acts to recover damages for the death of a railroad employee, the undisputed evidence established that the employee was killed when a motor-driven track car on which he was following a train crashed into the train when it stopped suddenly and unexpectedly because of a defective air-brake appliance. *Held:*

1. His administrator was entitled to recover if this defective appliance was the sole or a contributory proximate cause of the employee's death. Pp. 521–523.

2. On the evidence in this case, the jury could have found that decedent's death resulted in whole or in part from the defective appliance; and it was error to direct a verdict for the railroad. Pp. 523–524.

— Utah —, 185 P. 2d 963, reversed.

In a suit under the Federal Safety Appliance and Federal Employers' Liability Acts to recover damages from a railroad for the death of an employee, a state trial court directed a verdict for the railroad. The Supreme Court of Utah affirmed. — Utah —, 185 P. 2d 963. This Court granted certiorari. 335 U. S. 807. *Reversed and remanded,* p. 524.

Parnell Black argued the cause for petitioner. With him on the brief were *Calvin W. Rawlings* and *Harold E. Wallace.*

A. H. Nebeker argued the cause for respondent. With him on the brief were *Paul H. Ray* and *S. J. Quinney.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This action was brought in a Utah state court under the Federal Safety Appliance and Federal Employers' Liability Acts [1] to recover damages for the death of Frank Lucus, an employee of the respondent railroad. The decedent's death occurred when a one-man flat-top motor-driven track car crashed into the back end of an eighty-two-car freight train on a main-line track at a point near Lemay, Utah. Both train and motorcar were being operated in an eastward direction on railroad business. The train unexpectedly stopped just before the crash occurred because the air in its brake lines escaped, thereby locking the brakes. The air had escaped because of a violation of the Federal Safety Appliance Act in that the threads on a valve were so badly worn that a nut became disconnected. When the brakes locked, the motorcar was several hundred feet behind the freight train moving at about the same rate as the train, not an excessive rate under ordinary circumstances. The motorcar was equipped with brakes which had they been applied could have stopped the car within a distance of about one hundred feet. But the decedent who was in control of the car did not apply the brakes. Apparently he and another employee with him were looking backward toward a block signal and therefore did not know the train had stopped.[2]

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[1] 27 Stat. 531, 45 U. S. C. §§ 1, 8, 9; 35 Stat. 65, as amended, 36 Stat. 291, and 53 Stat. 1404, 45 U. S. C. §§ 51, 53.

[2] Petitioner was employed by the railroad as a signal maintainer. The other occupant of the motorcar had just been employed to

Despite the proof that the train had stopped because of the railroad's violation of the Federal Safety Appliance Act, the state trial judge directed the jury to return a verdict in the railroad's favor. This resulted from the court's holding that the Act didn't apply to Mr. Lucus, that the Act's protection against defective brakes did not extend to employees following and crashing into a train which stopped suddenly because of defective brake appliances.

On appeal the State Supreme Court affirmed. — Utah —, 185 P. 2d 963. That court agreed with the trial court's interpretation of the Safety Appliance Act and also held that the evidence failed to show that the defective appliance was the "legal" cause of the crash and of the death of decedent. The obvious importance of the restrictive interpretation given to the two federal Acts prompted us to grant certiorari.

First. We cannot agree with the State Supreme Court's holding that although the railroad ran its train with defective brakes it thereby "violated no duty owing" to the decedent. That court said that the object of the Safety Appliance Act "insofar as brakes might be concerned, is not to protect employees from standing, but from moving trains."

We do not view the Act's purpose so narrowly. It commands railroads not to run trains with defective brakes. An abrupt or unexpected stop due to bad brakes might be equally dangerous to employees and others as a failure to stop a train because of bad brakes. And this Act, fairly interpreted, must be held to protect all who

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work in the same capacity. This was the new employee's first trip and he took the trip to familiarize himself with the signals. Both occupants of the car were seated and looking back in the direction of a block signal. Contributory negligence is not a defense to this action.

need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances. *Fairport, P. & E. R. Co.* v. *Meredith,* 292 U. S. 589, 597. Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment "not from the position the employee may be in or the work which he may be doing at the moment when he is injured." *Brady* v. *Terminal R. Assn.,* 303 U. S. 10, 16; *Louisville & N. R. Co.* v. *Layton,* 243 U. S. 617, 621. In this case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliances, petitioner was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death. *Davis* v. *Wolfe,* 263 U. S. 239, 243; *Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S. 497, 509–510.

Second. The Utah Supreme Court reviewed the evidence here and held as a matter of law that the defective equipment did not proximately cause or contribute to the decedent's death. That court discussed distinctions between "proximate cause" in the legal sense, deemed a sufficient cause to impose liability, and "cause" in the "philosophic sense," deemed insufficient to impose liability. It considered the stopping of this train to have been a cause of decedent's death in the "philosophic sense" in that the stopping created "a condition upon which the negligence of plaintiffs' intestate operated," one perhaps of many causes "so insignificant that no ordinary mind would think of them as causes." The court added, however, that the stopping "was not the legal cause of the result," thereby classifying it as not "a substantial factor as well as actual factor in bringing about" the decedent's death. This conclusion was reached in part

upon the reasoning that "The leak in the triple valve caused the train to stop, because as a safety device, it was designed to do just that."

The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths "resulting in whole or in part" from defective appliances such as were here maintained. 45 U. S. C. § 51. And to make its purpose crystal clear, Congress has also provided that "no such employee . . . shall be held to have been guilty of contributory negligence in any case" where a violation of the Safety Appliance Act, such as the one here, "contributed to the . . . death of such employee." 45 U. S. C. § 53. Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages. These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances.

It was error to direct a verdict for the railroad. The judgment of the State Supreme Court is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

LINCOLN FEDERAL LABOR UNION ET AL. *v.* NORTHWESTERN IRON & METAL CO. ET AL.

NO. 47. APPEAL FROM THE SUPREME COURT OF NEBRASKA.*

Argued November 8–10, 1948.—Decided January 3, 1949.

A Nebraska constitutional amendment and a North Carolina statute provide, in effect, that no person in those States shall be denied an opportunity to obtain or retain employment because he is or is not a member of a labor organization. They also forbid employers to enter into contracts or agreements obligating themselves to exclude persons from employment because they are or are not members of labor unions. *Held:* They do not violate rights guaranteed to employers, unions, or members of unions by the Constitution of the United States. Pp. 527–537.

1. These state laws do not abridge the freedom of speech and the right of unions and their members "peaceably to assemble, and to petition the Government for a redress of grievances," which are guaranteed by the First Amendment and made applicable to the States by the Fourteenth Amendment. Pp. 529–531.

2. Nor do they conflict with Article I, § 10, of the Constitution, insofar as they impair the obligation of contracts made prior to their enactment. Pp. 531–532.

3. Nor do they deny unions and their members equal protection of the laws contrary to the Fourteenth Amendment. Pp. 532–533.

4. Nor do they deprive employers, unions or members of unions of their liberty without due process of law in violation of the Fourteenth Amendment. Pp. 533–537.

149 Neb. 507, 31 N. W. 2d 477, affirmed.

228 N. C. 352, 45 S. E. 2d 860, affirmed.

No. 47. In a suit brought by certain labor organizations and the president of one of them for a declaratory judgment and equitable relief, a Nebraska trial court sustained the validity of the so-called "Right-to-Work Amendment" to the Nebraska Constitution, now designated as Art. XV, §§ 13, 14 and 15, and sustained a de-

*Together with No. 34, *Whitaker et al.* v. *North Carolina,* on appeal from the Supreme Court of North Carolina.

murrer to the petition. The Supreme Court of Nebraska affirmed. 149 Neb. 507, 31 N. W. 2d 477. On appeal to this Court, *affirmed,* p. 537.

No. 34. An employer and certain officers and agents of certain labor unions were convicted in a North Carolina state court of violations of N. C. Acts, 1947, ch. 328, N. C. Gen. Stat., ch. 95, Art. 10, for entering into a "closed-shop agreement." The Supreme Court of North Carolina affirmed and sustained the validity of the statute under the Constitution of the United States. 228 N. C. 352, 45 S. E. 2d 860. On appeal to this Court, *affirmed,* p. 537.

Herbert S. Thatcher argued the cause for appellants in both cases and *George Pennell* argued the cause for appellants in No. 34. With them on the brief for appellants were *J. Albert Woll, James A. Glenn, J. H. Morgan* and *H. S. McCluskey.*

Irving Hill argued the cause and filed a brief for the Northwestern Iron & Metal Co., appellee in No. 47.

Edson Smith argued the cause for the Nebraska Small Business Men's Association, and *Robert A. Nelson,* Assistant Attorney General of Nebraska, for the State of Nebraska, appellees in No. 47. With them on the brief were *Walter R. Johnson,* Attorney General of Nebraska, *Clarence S. Beck,* Deputy Attorney General, and *Edward R. Burke.*

Ralph Moody, Assistant Attorney General of North Carolina, argued the cause for appellee in No. 34. With him on the brief was *Harry McMullan,* Attorney General.

Arthur J. Goldberg and *Frank Donner* filed an *amicus curiae* memorandum on behalf of the Congress of Indus-

trial Organizations and its affiliated organizations, in support of appellants.

An *amicus curiae* brief in support of appellees was filed on behalf of the States of Florida, by *J. Tom Watson,* Attorney General; Michigan, by *Eugene F. Black,* Attorney General; North Dakota, by *P. O. Sathre,* Attorney General; Tennessee, by *William F. Barry,* Solicitor General; Utah, by *Grover A. Giles,* Attorney General; and Wisconsin, by *Grover L. Broadfoot,* Attorney General, *Stewart G. Honeck,* Deputy Attorney General, and *Beatrice Lampert,* Assistant Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

Under employment practices in the United States, employers have sometimes limited work opportunities to members of unions, sometimes to non-union members, and at other times have employed and kept their workers without regard to whether they were or were not members of a union. Employers are commanded to follow this latter employment practice in the states of North Carolina and Nebraska. A North Carolina statute and a Nebraska constitutional amendment[1] provide that no

[1] Section 2 of Chapter 328 of the North Carolina Session Laws, enacted in 1947, reads as follows:

"Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina."

Nebraska in 1946 adopted a constitutional amendment, Art. XV, § 13 of which reads as follows:

"No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organ-

person in those states shall be denied an opportunity to obtain or retain employment because he is or is not a member of a labor organization. To enforce this policy North Carolina and Nebraska employers are also forbidden to enter into contracts or agreements obligating themselves to exclude persons from employment because they are or are not labor union members.[2]

These state laws were given timely challenge in North Carolina and Nebraska courts on the ground that insofar as they attempt to protect non-union members from discrimination, the laws are in violation of rights guaranteed employers, unions, and their members by the United States Constitution.[3] The state laws were challenged as violations of the right of freedom of speech, of assembly

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ization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization."

[2] Shops that refuse to employ any but union members are sometimes designated as "closed shops," sometimes as "union shops." Contracts which obligate an employer to employ none but union members are sometimes designated as union security agreements, closed shop contracts or union shop contracts. There is also much dispute as to the exact meaning of the term "open shop." See *Encyclopedia of Social Sciences,* Vol. 3 (1930), pp. 568–569. There is such an important difference in emphasis between these different labels that we think it better to avoid use of any of them in this opinion.

[3] The Nebraska constitutional amendment was challenged in an action for equitable relief and for a declaratory judgment. A substantial basis of the complaint was that employers had refused to comply with the request of unions to discharge certain employees who had failed to retain union membership. In North Carolina, criminal proceedings were instituted against the appellants charging that an agreement made unlawful by the statute had been entered into by the appellant employer and the other appellants, who are officers and agents of labor unions affiliated with the American Federation of Labor.

and of petition guaranteed unions and their members by "the First Amendment and protected against invasion by the State under the Fourteenth Amendment." It was further contended that the state laws impaired the obligations of existing contracts in violation of Art. I, § 10, of the United States Constitution and deprived the appellant unions and employers of equal protection and due process of law guaranteed against state invasion by the Fourteenth Amendment. All of these contentions were rejected by the State Supreme Courts [4] and the cases are here on appeal under § 237 of the Judicial Code, 28 U. S. C. § 344 (now 28 U. S. C. § 1257). The substantial identity of the questions raised in the two cases prompted us to set them for argument together and for the same reason we now consider the cases in a single opinion.

First. It is contended that these state laws abridge the freedom of speech and the opportunities of unions and their members "peaceably to assemble, and to petition the Government for a redress of grievances." [5] Under the state policy adopted by these laws, employers must, other considerations being equal, give equal opportunities for

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[4] *State* v. *Whitaker*, 228 N. C. 352, 45 S. E. 2d 860; *Lincoln Federal Labor Union No. 19129* v. *Northwestern Iron & Metal Co.*, 149 Neb. 507, 31 N. W. 2d 477. See also *American Federation of Labor* v. *American Sash & Door Co.*, 67 Ariz. 20, 189 P. 2d 912. An appeal in this latter case was also argued along with the two cases considered in this opinion. We have treated the Arizona case in a separate opinion, *post*, p. 538, because the challenged Arizona amendment presents a question not raised in the Nebraska or North Carolina laws.

[5] This contention rests on the premise that the Fourteenth Amendment makes the prohibitions and guarantees of the First Amendment applicable to state action. See *West Virginia* v. *Barnette*, 319 U. S. 624, 639. The pertinent language of the First Amendment is "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

remunerative work to union and non-union members without discrimination against either. In order to achieve this objective of equal opportunity for the two groups, employers are forbidden to make contracts which would obligate them to hire or keep none but union members. Nothing in the language of the laws indicates a purpose to prohibit speech, assembly, or petition. Precisely what these state laws do is to forbid employers acting alone or in concert with labor organizations deliberately to restrict employment to none but union members.

It is difficult to see how enforcement of this state policy could infringe the freedom of speech of anyone, or deny to anyone the right to assemble or to petition for a redress of grievances. And appellants do not contend that the laws expressly forbid the full exercise of those rights by unions or union members. Their contention is that these state laws indirectly infringe their constitutional rights of speech, assembly, and petition. While the basis of this contention is not entirely clear, it seems to rest on this line of reasoning: The right of unions and union members to demand that no non-union members work along with union members is "indispensable to the right of self-organization and the association of workers into unions"; without a right of union members to refuse to work with non-union members, there are "no means of eliminating the competition of the non-union worker"; since, the reasoning continues, a "closed shop" is indispensable to achievement of sufficient union membership to put unions and employers on a full equality for collective bargaining, a closed shop is consequently "an indispensable concomitant" of "the right of employees to assemble into and associate together through labor organizations . . . ." Justification for such an expansive construction of the right to speak, assemble and petition is

then rested in part on appellants' assertion "that the right to work as a non-unionist is in no way equivalent to or the parallel of the right to work as a union member; that there exists no constitutional right to work as a non-unionist on the one hand while the right to maintain employment free from discrimination because of union membership is constitutionally protected." *Cf. Wallace Corporation* v. *Labor Board,* 323 U. S. 248.

We deem it unnecessary to elaborate the numerous reasons for our rejection of this contention of appellants. Nor need we appraise or analyze with particularity the rather startling ideas suggested to support some of the premises on which appellants' conclusions rest. There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not participate in union assemblies. The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly.

Second. There is a suggestion though not elaborated in briefs that these state laws conflict with Art. I, § 10, of the United States Constitution, insofar as they impair the obligation of contracts made prior to their enactment. That this contention is without merit is now too clearly established to require discussion. See *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 436–439, and cases

there cited. And also *Veix* v. *Sixth Ward Bldg. & Loan Assn.*, 310 U. S. 32, 38; *East New York Savings Bank* v. *Hahn*, 326 U. S. 230, 232.

Third. It is contended that the North Carolina and Nebraska laws deny unions and their members equal protection of the laws and thus offend the equal protection clause of the Fourteenth Amendment. Because the outlawed contracts are a useful incentive to the growth of union membership, it is said that these laws weaken the bargaining power of unions and correspondingly strengthen the power of employers. This may be true. But there are other matters to be considered. The state laws also make it impossible for an employer to make contracts with company unions which obligate the employer to refuse jobs to union members. In this respect, these state laws protect the employment opportunities of members of independent unions. See *Wallace Corporation* v. *Labor Board, supra.* This circumstance alone, without regard to others that need not be mentioned, is sufficient to support the state laws against a charge that they deny equal protection to unions as against employers and non-union workers.

It is also argued that the state laws do not provide protection for union members equal to that provided for non-union members. But in identical language these state laws forbid employers to discriminate against union and non-union members. Nebraska and North Carolina thus command equal employment opportunities for both groups of workers. It is precisely because these state laws command equal opportunities for both groups that appellants argue that the constitutionally protected rights of assembly and due process have been violated. For the constitutional protections surrounding these rights are relied on by appellants to support a contention that the Federal Constitution guarantees greater employment

rights to union members than to non-union members. This claim of appellants is itself a refutation of the contention that the Nebraska and North Carolina laws fail to afford protection to union members equal to the protection afforded non-union workers.

Fourth. It is contended that these state laws deprive appellants of their liberty without due process of law in violation of the Fourteenth Amendment. Appellants argue that the laws are specifically designed to deprive all persons within the two states of "liberty" (1) to refuse to hire or retain any person in employment because he is or is not a union member, and (2) to make a contract or agreement to engage in such employment discrimination against union or non-union members.

Much of appellants' argument here seeks to establish that due process of law is denied employees and union men by that part of these state laws that forbids them to make contracts with the employer obligating him to refuse to hire or retain non-union workers. But that part of these laws does no more than provide a method to aid enforcement of the heart of the laws, namely, their command that employers must not discriminate against either union or non-union members because they are such. If the states have constitutional power to ban such discrimination by law, they also have power to ban contracts which if performed would bring about the prohibited discrimination. *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 570, 571.

Many cases are cited by appellants in which this Court has said that in some instances the due process clause protects the liberty of persons to make contracts. But none of these cases, even those according the broadest constitutional protection to the making of contracts, ever went so far as to indicate that the due process clause bars a state from prohibiting contracts to engage in con-

duct banned by a valid state law. So here, if the provisions in the state laws against employer discrimination are valid, it follows that the contract prohibition also is valid. *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, 427. And see *Sage* v. *Hampe,* 235 U. S. 99, 104–105. We therefore turn to the decisive question under the due process contention, which is: Does the due process clause forbid a state to pass laws clearly designed to safeguard the opportunity of non-union workers to get and hold jobs, free from discrimination against them because they are non-union workers?

There was a period in which labor union members who wanted to get and hold jobs were the victims of widespread employer discrimination practices. Contracts between employers and their employees were used by employers to accomplish this anti-union employment discrimination. Before hiring workers, employers required them to sign agreements stating that the workers were not and would not become labor union members. Such anti-union practices were so obnoxious to workers that they gave these required agreements the name of "yellow dog contracts." This hostility of workers also prompted passage of state and federal laws to ban employer discrimination against union members and to outlaw yellow dog contracts.

In 1907 this Court in *Adair* v. *United States,* 208 U. S. 161, considered the federal law which prohibited discrimination against union workers. Adair, an agent of the Louisville & Nashville Railroad Company, had been indicted and convicted for having discharged Coppage, an employee of the railroad, because Coppage was a member of the Order of Locomotive Firemen. This Court there held, over the dissents of Justices McKenna and Holmes, that the railroad, because of the due process clause of the Fifth Amendment, had a constitutional right to dis-

criminate against union members and could therefore do so through use of yellow dog contracts. The chief reliance for this holding was *Lochner* v. *New York,* 198 U. S. 45, which had invalidated a New York law prescribing maximum hours for work in bakeries. This Court had found support for its *Lochner* holding in what had been said in *Allgeyer* v. *Louisiana,* 165 U. S. 578, a case on which appellants here strongly rely. There were strong dissents in the *Adair* and *Lochner* cases.

In 1914 this Court reaffirmed the principles of the *Adair* case in *Coppage* v. *Kansas,* 236 U. S. 1, again over strong dissents, and held that a Kansas statute outlawing yellow dog contracts denied employers and employees a liberty to fix terms of employment. For this reason the law was held invalid under the due process clause.

The *Allgeyer-Lochner-Adair-Coppage* constitutional doctrine was for some years followed by this Court. It was used to strike down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities. See cases cited in *Olsen* v. *Nebraska,* 313 U. S. 236, 244–246, and *Osborn* v. *Ozlin,* 310 U. S. 53, 66–67. And the same constitutional philosophy was faithfully adhered to in *Adams* v. *Tanner,* 244 U. S. 590, a case strongly pressed upon us by appellants. In *Adams* v. *Tanner,* this Court with four justices dissenting struck down a state law absolutely prohibiting maintenance of private employment agencies. The majority found that such businesses were highly beneficial to the public and upon this conclusion held that the state was without power to proscribe them. Our holding and opinion in *Olsen* v. *Nebraska, supra,* clearly undermined *Adams* v. *Tanner.*

Appellants also rely heavily on certain language used in this Court's opinion in *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522. In that case the

Court invalidated a state law which in part provided a method for a state agency to fix wages and hours.[6] See *Wolff Co.* v. *Industrial Court,* 267 U. S. 552, 565. In invalidating this part of the state act, this Court construed the due process clause as forbidding legislation to fix hours and wages, or to fix prices of products. The Court also relied on a distinction between businesses according to whether they were or were not "clothed with a public interest." This latter distinction was rejected in *Nebbia* v. *New York,* 291 U. S. 502. That the due process clause does not ban legislative power to fix prices, wages and hours as was assumed in the *Wolff* case, was settled as to price fixing in the *Nebbia* and *Olsen* cases. That wages and hours can be fixed by law is no longer doubted since *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *United States* v. *Darby,* 312 U. S. 100, 125; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 187.

This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See *Nebbia* v. *New York, supra* at 523–524, and *West Coast Hotel Co.* v. *Parrish, supra* at 392–395, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in

[6] Other parts of the state statute related to matters other than wages, prices, and the making of contracts of employment. Considerations involved in the constitutional validity of those other parts of the statute are not relevant here.

a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

Appellants now ask us to return, at least in part, to the due process philosophy that has been deliberately discarded. Claiming that the Federal Constitution itself affords protection for union members against discrimination, they nevertheless assert that the same Constitution forbids a state from providing the same protection for non-union members. Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers.

Affirmed.

[For concurring opinion of MR. JUSTICE FRANKFURTER, see *post,* p. 542.]

[For concurring opinion of MR. JUSTICE RUTLEDGE, joined by MR. JUSTICE MURPHY insofar as it applies to Nos. 34 and 47, see *post,* p. 557.]

AMERICAN FEDERATION OF LABOR ET AL. *v.* AMERICAN SASH & DOOR CO. ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 27. Argued November 8–10, 1948.—Decided January 3, 1949.

1. The amendment to the Arizona Constitution which provides that no person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization and forbids anyone to enter into an agreement to do so does not deny employers, labor unions or members of labor unions freedom of speech, assembly or petition, or impair the obligation of their contracts, or deprive them of due process of law, contrary to the Constitution of the United States. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, *ante*, p. 525. Pp. 539–540.
2. Nor does its failure to forbid like discrimination against union members deny them equal protection of the laws contrary to the Fourteenth Amendment—especially in view of the fact that certain Arizona statutes make it a misdemeanor for any person to coerce a worker to make a contract "not to join or become a member of a labor organization" as a condition of employment in Arizona and make such contracts void and unenforceable. *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1. Pp. 540–542.

67 Ariz. 20, 189 P. 2d 912, affirmed.

In a suit by certain labor unions, an officer of one of them and an employer for a declaratory judgment and equitable relief against enforcement of the "Right-to-Work Amendment" to the Arizona Constitution, an Arizona trial court dismissed the complaint on the ground that the amendment did not violate the Constitution of the United States. The Supreme Court of Arizona affirmed. 67 Ariz. 20, 189 P. 2d 912. On appeal to this Court, *affirmed*, p. 542.

Herbert S. Thatcher and *H. S. McCluskey* argued the cause for appellants. With them on the brief were *J. Albert Woll*, *James A. Glenn*, *J. H. Morgan* and *George Pennell*.

Donald R. Richberg argued the cause for appellees. With him on the brief were *Evo De Concini,* Attorney General of Arizona, *Perry M. Ling,* Chief Assistant Attorney General, *Charles L. Strouss* and *J. L. Gust. G. H. Moeur* was also of counsel for appellees.

An *amicus curiae* brief in support of appellees was filed on behalf of the States of Florida, by *J. Tom Watson,* Attorney General; Michigan, by *Eugene F. Black,* Attorney General; North Dakota, by *P. O. Sathre,* Attorney General; Tennessee, by *William F. Barry,* Solicitor General; Utah, by *Grover A. Giles,* Attorney General; and Wisconsin, by *Grover L. Broadfoot,* Attorney General, *Stewart G. Honeck,* Deputy Attorney General, and *Beatrice Lampert,* Assistant Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case is here on appeal from the Supreme Court of Arizona under § 237 of the Judicial Code as amended, 28 U. S. C. § 344 (now 28 U. S. C. § 1257). It involves the constitutional validity of the following amendment to the Arizona Constitution, adopted at the 1946 general election:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

The Supreme Court of Arizona sustained the amendment as constitutional against the contentions that it "deprived union appellants of rights guaranteed under the First Amendment and protected against invasion by the State under the Fourteenth Amendment to the

United States Constitution"; that it impaired the obligations of existing contracts in violation of Art. I, § 10, of the United States Constitution; and that it deprived appellants of due process of law, and denied them equal protection of the laws contrary to the Fourteenth Amendment. All of these questions, properly reserved in the state court, were decided against the appellants by the State Supreme Court.[1] The same questions raised in the state court are presented here.

For reasons given in two other cases decided today we reject the appellants' contentions that the Arizona amendment denies them freedom of speech, assembly or petition, impairs the obligation of their contracts, or deprives them of due process of law. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.* and *Whitaker* v. *North Carolina, ante,* p. 525. A difference between the Arizona amendment and the amendment and statute considered in the Nebraska and North Carolina cases has made it necessary for us to give separate consideration to the contention in this case that the Arizona amendment denies appellants equal protection of the laws.

The language of the Arizona amendment prohibits employment discrimination against non-union workers, but it does not prohibit discrimination against union workers. It is argued that a failure to provide the same protection for union workers as that provided for non-union workers places the union workers at a disadvantage, thus denying unions and their members the equal protection of Arizona's laws.

Although the Arizona amendment does not itself expressly prohibit discrimination against union workers, that state has not left unions and union members without protection from discrimination on account of union mem-

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[1] *American Federation of Labor* v. *American Sash & Door Co.*, 67 Ariz. 20, 189 P. 2d 912.

bership. Prior to passage of this constitutional amendment, Arizona made it a misdemeanor for any person to coerce a worker to make a contract "not to join, become or remain, a member of any labor organization" as a condition of getting or holding a job in Arizona. A section of the Arizona Code made every such contract (generally known as a "yellow dog contract") void and unenforceable.[2] Similarly, the Arizona constitutional amendment makes void and unenforceable contracts under which an employer agrees to discriminate against non-union workers. Statutes implementing the amendment have provided as sanctions for its enforcement relief by injunction and suits for damages for discrimination practiced in violation of the amendment.[3] Whether the same kind of sanctions would be afforded a union worker against whom an employer discriminated is not made clear by the opinion of the State Supreme Court in this case. But assuming that Arizona courts would not afford a remedy by injunction or suit for damages, we are unable to find any indication that Arizona's amendment and statutes are weighted on the side of non-union as against union workers. We are satisfied that Arizona has attempted both in the anti-yellow-dog-contract law and in the anti-discrimination constitutional amendment to strike at what were considered evils, to strike where those evils were most felt, and to strike in a manner that would effectively suppress the evils.

In *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, this Court considered a challenge to the National Labor Relations Act on the ground that it applied restraints against employers but did not apply similar restraints against wrongful conduct by employees. We there pointed out, at p. 46, the general rule that "legislative

[2] Ariz. Code Ann. § 56–120 (1939).

[3] Ariz. Sess. Laws (1947) c. 81, p. 173.

authority, exerted within its proper field, need not embrace all the evils within its reach." And concerning state laws we have said that the existence of evils against which the law should afford protection and the relative need of different groups for that protection "is a matter for the legislative judgment." *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 400. We cannot say that the Arizona amendment has denied appellants equal protection of the laws.

Affirmed.

MR. JUSTICE MURPHY dissents.

MR. JUSTICE FRANKFURTER, concurring.*

Arizona, Nebraska, and North Carolina have passed laws forbidding agreements to employ only union members. The United States Constitution is invoked against these laws. Since the cases bring into question the judicial process in its application to the Due Process Clause, explicit avowal of individual attitudes towards that process may elucidate and thereby strengthen adjudication. Accordingly, I set forth the steps by which I have reached concurrence with my brethren on what I deem the only substantial issue here, on all other issues joining the Court's opinion.

The coming of the machine age tended to despoil human personality. It turned men and women into "hands." The industrial history of the early Nineteenth Century demonstrated the helplessness of the individual employee to achieve human dignity in a society so largely affected by technological advances. Hence the trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of work-

*[This is also a concurrence in No. 47, *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* and No. 34, *Whitaker* v. *North Carolina,* decided together, *ante,* p. 525.]

ers but as an aid to the well-being of a society in which work is an expression of life and not merely the means of earning subsistence. But unionization encountered the shibboleths of a pre-machine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of "liberty" were equated with theories of *laissez faire*.[1] The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. This misapplication of the notions of the classic economists and resulting disregard of the perduring reach of the Constitution led to Mr. Justice Holmes' famous protest in the *Lochner* case against measuring the Fourteenth Amendment by Mr. Herbert Spencer's Social Statics. 198 U. S. 45, 75. Had not Mr. Justice Holmes' awareness of the impermanence of legislation as against the permanence of the Constitution gradually prevailed, there might indeed have been "hardly any limit but the sky" to the embodiment of "our economic or moral beliefs" in that Amendment's "prohibitions." *Baldwin* v. *Missouri,* 281 U. S. 586, 595.

The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earner's bargaining power.

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[1] Of course, theory never wholly squared with the facts. Even while *laissez faire* doctrines were dominant, State activity in economic affairs was considerable. See Handlin, Commonwealth: A Study of the Role of Government in the American Economy, Massachusetts, 1774–1861 (1947); Hartz, Economic Policy and Democratic Thought: Pennsylvania, 1776–1860 (1948).

With that attitude as a premise, *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1, followed logically enough; not even *Truax* v. *Corrigan,* 257 U. S. 312, could be considered unexpected. But when the tide turned, it was not merely because circumstances had changed and there had arisen a new order with new claims to divine origin. The opinion of Mr. Justice Brandeis in *Senn* v. *Tile Layers Union,* 301 U. S. 468, shows the current running strongly in the new direction—the direction not of social dogma but of increased deference to the legislative judgment. "Whether it was wise," he said, now speaking for the Court and not in dissent, "for the State to permit the unions to [picket] is a question of its public policy—not our concern." *Id.* at 481. Long before that, in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 488, he had warned:

> "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

Unions are powers within the State. Like the power of industrial and financial aggregations, the power of organized labor springs from a group which is only a fraction of the whole that Mr. Justice Holmes referred to as "the one club to which we all belong." The power of the former is subject to control, though, of course, the

particular incidence of control may be brought to test at the bar of this Court. *E. g., Northern Securities Co.* v. *United States,* 193 U. S. 197; *North American Co.* v. *S. E. C.,* 327 U. S. 686. Neither can the latter claim constitutional exemption. Even the Government—the organ of the whole people—is restricted by the system of checks and balances established by our Constitution. The designers of that system distributed authority among the three branches "not to promote efficiency but to preclude the exercise of arbitrary power." Mr. Justice Brandeis, dissenting in *Myers* v. *United States,* 272 U. S. 52, 293. Their concern for individual members of society, for whose well-being government is instituted, gave urgency to the fear that concentrated power would become arbitrary. It is a fear that the history of such power, even when professedly employed for democratic purposes, has hardly rendered unfounded.

If concern for the individual justifies incorporating in the Constitution itself devices to curb public authority, a legislative judgment that his protection requires the regulation of the private power of unions cannot be dismissed as insupportable. A union is no more than a medium through which individuals are able to act together; union power was begotten of individual helplessness. But that power can come into being only when, and continue to exist only so long as, individual aims are seen to be shared in common with the other members of the group. There is a natural emphasis, however, on what is shared and a resulting tendency to subordinate the inconsistent interests and impulses of individuals. From this, it is an easy transition to thinking of the union as an entity having rights and purposes of its own. An ardent supporter of trade unions who is also no less a disinterested student of society has pointed out that "As soon as we personify the idea, whether it is a country or a church, a trade union or an employers' association, we obscure

individual responsibility by transferring emotional loyalties to a fictitious creation which then acts upon us psychologically as an obstruction, especially in times of crisis, to the critical exercise of a reasoned judgment." Laski, *Morris Cohen's Approach to Legal Philosophy,* 15 U. of Chi. L. Rev. 575, 581 (1948).

The right of association, like any other right carried to its extreme, encounters limiting principles. See *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355. At the point where the mutual advantage of association demands too much individual disadvantage, a compromise must be struck. See Dicey, *Law and Public Opinion in England* 465–66 (1905). When that point has been reached—where the intersection should fall—is plainly a question within the special province of the legislature. This Court has given effect to such a compromise in sustaining a legislative purpose to protect individual employees against the exclusionary practices of unions. *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192; *Wallace Corp.* v. *Labor Board,* 323 U. S. 248; *Railway Mail Assn.* v. *Corsi,* 326 U. S. 88; cf. *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 733–34. The rationale of the Arizona, Nebraska, and North Carolina legislation prohibiting union-security agreements is founded on a similar resolution of conflicting interests.[2] Unless we are to treat

[2] See, *e. g.,* State of Arizona Initiative and Referendum Publicity Pamphlet, 1946 (Compiled and Issued by the Secretary of State); Testimony before the Nebraska State Legislative Committee on Labor and Public Welfare, March 21, 1947 (transcript of the Committee's record of the substance of the testimony kindly furnished by the Department of Justice of Nebraska); *The Case against the Closed Shop in Nebraska,* a pamphlet published by the "Right to Work Committee"; N. C. Sess. Laws, 1947, c. 328, § 1 (preamble). As to the similar purpose of similar legislation in other States, see, *e. g., The Open Shop in Virginia,* Report of the Virginia Advisory Legislative Council to the Governor of Virginia, House Doc. No. 2,

as unconstitutional what goes against the grain because it offends what we may strongly believe to be socially desirable, that resolution must be given respect.

It is urged that the compromise which this legislation embodies is no compromise at all because fatal to the survival of organized labor. But can it be said that the legislators and the people of Arizona, Nebraska, and North Carolina could not in reason be sceptical of organized labor's insistence upon the necessity to its strength of power to compel rather than to persuade the allegiance of its reluctant members? In the past fifty years the total number of employed, counting salaried workers and the self-employed but not farmers or farm laborers, has not quite trebled, while total union membership has increased more than thirty-three times; at the time of the open-shop drive following the First World War, the ratio of organized to unorganized non-agricultural workers was about one to nine, and now it is almost one to three.[3] However necessitous may have been the circumstances of unionism in 1898 or even in 1923, its status in 1948 precludes constitutional condemnation of a legislative judgment, whatever we may think of it, that the need of this type of regulation outweighs its detriments. It would be arbitrary for this Court to deny the States the right to experiment with such laws, especially in view of the fact that the Railroad Brotherhoods have held their own de-

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p. 7 (1947); Address of Wm. M. Tuck to the General Assembly and People of Virginia, Extra Session, House Doc. No. 1, pp. 8–9 (1947); Tucumcari (N. M.) Daily News, Oct. 6, 1948, p. 3, col. 3 (report of radio addresses by sponsors of proposed "Right-to-Work Amendment").

[3] In the following table, "union membership" includes all members of AFL, CIO, and independent or unaffiliated unions, including Canadian members of international unions with headquarters in the United States; the "employment" figures include all non-

spite congressional prohibition of union security [4] and in the light of the experience of countries advanced in industrial democracy, such as Great Britain and Sweden, where deeply rooted acceptance of the principles of collective

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agricultural employees (*i. e.*, wage and salary workers), nonagricultural self-employed, unpaid family workers, and domestic-service workers.

Year	*Union Membership (thousands)*	*Employment (thousands)*
1898	467	.....
1900	791	17,826
1903	1,824	20,202
1908	2,092	22,871
1913	2,661	27,031
1918	3,368	33,456
1923	3,629	32,314
1928	3,567	35,505
1933	2,857	28,670
1938	8,265	34,530
1943	13,642	45,390
1948	15,600	50,400

The "union membership" totals, except for 1948, are taken from *Membership of Labor Unions in the United States,* U. S. Dept. of Labor, Bureau of Labor Statistics (mimeographed pamphlet); the "union membership" and "employment" totals for 1948 are preliminary estimates by the Bureau of Labor Statistics. The "employment" figures for years up to 1928 are taken from *Employment and Unemployment of the Labor Force, 1900–1940,* 2 Conference Board Economic Record 77, 80 (1940); "employment" figures for years since 1929, except 1948, and the basis upon which they are estimated may be found in Technical Note, 67 Monthly Labor Rev., No. 1, p. 50 (1948).

[4] Section 2, Fourth, of the 1934 Amendment, 48 Stat. 1187, of the Railway Labor Act of 1926, 44 Stat. 577, 45 U. S. C. § 152, Fourth, appears on its face to bar union-shop agreements, and it has been so interpreted. 40 Ops. Atty. Gen., No. 59 (Dec. 29, 1942). The wisdom of such a legislative policy is of course not for us to judge.

In the following table, "Membership of Brotherhoods" includes the Brotherhood of Locomotive Engineers, the Brotherhood of Loco-

bargaining is not reflected in uncompromising demands for contractually guaranteed security.[5] Whether it is preferable in the public interest that trade unions should be subjected to State intervention or left to the free play of social forces, whether experience has disclosed "union unfair labor practices" and, if so, whether legislative correction is more appropriate than self-discipline and the

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motive Enginemen and Firemen, the Order of Railway Conductors, and the Brotherhood of Railroad Trainmen, with the Canadian membership of each, but not railroad employees who are members of CIO or independent unions. The 1919 figure for "Employment Class I Railroads" includes all, not merely Class I, operating carriers.

Year	*Membership of Brotherhoods (thousands)*	*Employment Class I Railroads (thousands)*
1919	456	1,908
1924	434	1,774
1929	423	1,661
1934	268	1,008
1939	303	988
1944	442	1,415
1947	450	1,352

The "Membership of Brotherhoods" figures are estimates made available through the kindness of the Bureau of Labor Statistics. Those for 1924–1934 are based on Wolman, Ebb and Flow in Trade Unionism 230–31 (1936). The figures for "Employment Class I Railroads" have been obtained from the I. C. C. annual reports entitled *Statistics of Railways in the United States*, that for 1919 from the 33d Ann. Rep. at 21 (1922); that for 1924 from 38th Ann. Rep. at XXV (1926); those for 1929, 1934, and 1939 from 54th Ann. Rep. at 59 (1942); that for 1944 from 60th Ann. Rep. at 55 (1948); that for 1947 from I. C. C., Bureau of Transport Economics and Statistics, Statement No. M–300, *Wage Statistics of Class I Steam Railways in the United States* (1947).

[5] See U. S. Dept. Labor, Report of the Commission on Industrial Relations in Great Britain 23 (1938); U. S. Dept. Labor, Report of the Commission on Industrial Relations in Sweden 9 (1938). Cf. The Universal Declaration of Human Rights, Art. 20, cl. 2, adopted by the General Assembly of the United Nations, Dec. 11, 1948, declaring that "No one may be compelled to belong to an association."

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pressure of public opinion—these are questions on which it is not for us to express views. The very limited function of this Court is discharged when we recognize that these issues are not so unrelated to the experience and feelings of the community as to render legislation addressing itself to them wilfully destructive of cherished rights. For these are not matters, like censorship of the press or separation of Church and State, on which history, through the Constitution, speaks so decisively as to forbid legislative experimentation.

But the policy which finds expression in the prohibition of union-security agreements need not rest solely on a legislative conception of the public interest which includes but transcends the special claims of trade unions. The States are entitled to give weight to views combining opposition to the "closed shop" with long-range concern for the welfare of trade unions. Mr. Justice Brandeis, for example, before he came to this Court, had been a staunch promoter of unionism. In testifying before the Commission on Industrial Relations, he said:

> "I should say to those employers who stand for the open shop, that they ought to recognize that it is for their interests as well as that of the community that unions should be powerful and responsible; that it is to their interests to build up the union; to aid as far as they can in making them stronger; and to create conditions under which the unions shall be led by the ablest and most experienced men." [6]

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[6] Sen. Doc. No. 415, 64th Cong., 1st Sess. 7681. For other expressions of Mr. Justice Brandeis' sympathy for the cause of trade unions, see *id.* at 7659–60, 7662, 7667; Brandeis, *The Employer and Trades Unions,* in Business—A Profession 13 (1914); *Industrial Co-operation,* 3 Filene Co-operative Association Echo, No. 3, p. 1 (May, 1905), reprinted in The Curse of Bigness 35 (Fraenkel ed. 1935); *Big Business and Industrial Liberty,* reprinted in *id.* at 38.

Yet at the same time he believed that "The objections, legal, economic, and social, against the closed shop are so strong, and the ideas of the closed shop so antagonistic to the American spirit, that the insistence upon it has been a serious obstacle to union progress." Letter of Sept. 6, 1910, to Lawrence F. Abbott of the *Outlook*.[7] On another occasion he wrote, "But the American people should not, and will not, accept unionism if it involves the closed shop. They will not consent to the exchange of the tyranny of the employer for the tyranny of the employee." Letter of Feb. 26, 1912, to Lincoln Steffens.[8] In summing up his views on unionism, he said:

> "It is not true that the 'success of a labor union' necessarily means a 'perfect monopoly'. The union, in order to attain or preserve for its members industrial liberty, must be strong and stable. It need not include every member of the trade. Indeed, it is desirable for both the employer and the union that it should not. Absolute power leads to excesses and to weakness: Neither our character nor our intelligence can long bear the strain of unrestricted power. The union attains success when it reaches

[7] Copy obtained from the collection of Brandeis papers at the Law Library of the University of Louisville, to which I am indebted. The letter is quoted in part in Mason, Brandeis: A Free Man's Life 301 (1946). See also testimony before the Commission on Industrial Relations, *op. cit. supra*, note 6, at 7680–81. As an alternative to the closed or union shop, Mr. Brandeis advocated the "preferential union shop," which, apparently, is also barred by the Arizona, Nebraska, and North Carolina laws. For accounts of the working of the "preferential union shop," see Moskowitz, *The Power for Constructive Reform in the Trade Union Movement*, 2 Life and Labor 10 (1912); Winslow, *Conciliation, Arbitration, and Sanitation in the Cloak, Suit, and Skirt Industry in New York City*, 24 Bulletin of the Bureau of Labor, No. 98, Jan., 1912, H. R. Doc. No. 166, 62d Cong., 2d Sess. 203, 215.

[8] Copy obtained from the University of Louisville; quoted in part in Mason, *op. cit. supra*, note 7, at 303–04.

> the ideal condition, and the ideal condition for a union is to be strong and stable, and yet to have in the trade outside its own ranks an appreciable number of men who are non-unionists. In any free community the diversity of character, of beliefs, of taste—indeed mere selfishness—will insure such a supply, if the enjoyment of this privilege of individualism is protected by law. Such a nucleus of unorganized labor will check oppression by the union as the union checks oppression by the employer." Quoted from Louis D. Brandeis' contribution to a discussion entitled *Peace with Liberty and Justice* in 2 Nat. Civic Federation Rev., No. 2, pp. 1, 16 (May 15, 1905).

Mr. Brandeis on the long view deemed the preferential shop a more reliable form of security both for unions and for society than the closed shop; that he did so only serves to prove that these are pragmatic issues not appropriate for dogmatic solution.

Whatever one may think of Mr. Brandeis' views, they have been reinforced by the adoption of laws insuring against that undercutting of union standards which was one of the most serious effects of a dissident minority in a union shop. Under interpretations of the National Labor Relations Act undisturbed by the Taft-Hartley Act,[9] and of the Railway Labor Act, the bargaining representative designated by a majority of employees has exclusive power to deal with the employer on matters of wages and working conditions. Individual contracts, whether on more or less favorable terms than those obtained by the union, are barred. *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332; *Order of R. R. Telegraphers* v. *Railway Express Agency,* 321 U. S. 342; *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678; see *Elgin,*

[9] See H. R. Rep. No. 245, 80th Cong., 1st Sess. 17; 93 Cong. Rec. 4371 (May 1, 1947).

J. & E. R. Co. v. *Burley,* 325 U. S. 711, 737, n. 35. Under these laws, a non-union bidder for a job in a union shop cannot, if he would, undercut the union standards.

Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error.[10] That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people. If the proponents of union-security agreements have confidence in the arguments addressed to the Court in their "economic brief," they should address those arguments to the electorate. Its endorsement would be a vindication that the mandate of this Court could never give. That such vindication

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[10] Examples of legislative experimentation undertaken to meet a recognized need were the bank-deposit guaranty laws passed in the wake of the panic of 1907 by Kansas, Nebraska, and Oklahoma. Despite serious doubts of their wisdom, the laws were sustained against due-process attack in *Noble State Bank* v. *Haskell,* 219 U. S. 104 and 575; *Shallenberger* v. *First State Bank,* 219 U. S. 114; *Assaria State Bank* v. *Dolley,* 219 U. S. 121. Experience proved the laws to be unworkable, see Robb, *Guaranty of Bank Deposits* in 2 Encyc. Soc. Sciences 417 (1930). But since no due-process obstacle stood in the way, it remained possible to profit by past errors and attempt a more mature solution of the problem on a national scale. See Sen. Rep. No. 77, 73d Cong., 1st Sess. 9–13; H. R. Rep. No. 150, 73d Cong., 1st Sess. 5–7. The result was establishment of the Federal Deposit Insurance Corporation by the Banking Act of 1933, 48 Stat. 168, 12 U. S. C. § 264. If that expedient should prove inadequate, the way is open for further experimentation. See Note, *The Glass-Steagall Banking Act of 1933,* 47 Harv. L. Rev. 325, 330–32 (1933).

is not a vain hope has been recently demonstrated by the voters of Maine, Massachusetts, and New Mexico.[11] And although several States in addition to those at bar now have such laws,[12] the legislatures of as many other States have, sometimes repeatedly, rejected them.[13] What one State can refuse to do, another can undo.

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[11] On Sept. 13, 1948, the voters of Maine rejected "An Act to Protect the Right to Work and to Prohibit Secondary Boycotts, Sympathetic Strikes and Jurisdictional Strikes" and "An Act Protecting the Right of Members and Non-members of Labor Organizations to the Opportunity to Work." The vote in favor of the first bill was 46,809; for the second, 13,676; against both bills, 126,285. These figures were kindly furnished by the Deputy Secretary of State of the State of Maine.

On Nov. 2, 1948, the voters of Massachusetts rejected a measure prohibiting "the denial of the opportunity to obtain or retain employment because of membership or non-membership in a labor organization," by a vote of 1,290,310 to 505,575. Report of the Executive Department of the Commonwealth of Massachusetts, Nov. 24, 1948, p. 60.

On the same day the voters of New Mexico rejected a similar bill by a vote of 60,118 to 41,387 (incomplete returns). See Clovis (N. M.) News-Journal, Nov. 5, 1948, p. 1, col. 3.

[12] Ark. Const. Amend. No. 34, Nov. 7, 1944, and Acts of Ark., 1947, Act 101; Del. Laws, 1947, c. 196, § 30; Fla. Const. Decl. of Rights § 12, as amended Nov. 7, 1944; Ga. Laws, 1947, No. 140; Iowa Laws, 1947, c. 296; La. Gen. Stat. § 4381.2 (Dart, 1939); Md. Ann. Code Gen. Laws art. 100, § 65 (1939); Nev. Comp. Laws § 10473 (1929); N. D. Laws, 1947, c. 243; S. D. Const. art. 6, § 2, as amended Nov. 1, 1946, and Laws, 1947, c. 92; Tenn. Public Acts, 1947, c. 36; Texas Laws, 1947, c. 74; Va. Acts of Assembly, 1947, c. 2.

For a valuable digest of State laws regulating labor activity see Killingsworth, State Labor Relations Acts, Appendix A, by Beverley Kritzman Killingsworth, at 267 (1948). It shows the variety and empiric character of such legislation for a single decade (1937–47).

[13] The following list of rejected anti-closed-shop laws has been compiled from U. S. Dept. Labor, Division of Labor Standards, Legislative Reports, 1939 to date.

Calif.: A. B. 1560, 1941; S. B. 974, 1941; *Conn.:* H. B. 557, S. B. 823, 1939; H. B. 302, 1947; *Kans.:* H. B. 256, S. B. 410, 1939;

But there is reason for judicial restraint in matters of policy deeper than the value of experiment: it is founded on a recognition of the gulf of difference between sustaining and nullifying legislation. This difference is theoretical in that the function of legislating is for legislatures who have also taken oaths to support the Constitution, while the function of courts, when legislation is challenged, is merely to make sure that the legislature has exercised an allowable judgment, and not to exercise their own judgment, whether a policy is within or without "the vague contours" of due process. Theory is reinforced by the notorious fact that lawyers predominate in American legislatures.[14] In practice also the difference is wide. In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as "an irresponsible body" [15] and "independent of the nation itself." [16] The Court is not saved from being oli-

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S. C. Res. No. 10, 1945; *Ky.:* S. B. 231, 1946; *Mass.:* H. B. 864, 1947; *Minn.:* S. B. 102, 1947; *Miss.:* H. B. 714, 1942; H. C. R. 21, 1944 (semble); H. B. 171, 1946; H. B. 328, 1948; H. B. 1000, 1948; *Mo.:* S. B. 144, 1945; *N. H.:* H. B. 225, 1945; *Ohio:* H. B. 49, 1947; *Utah:* S. J. R. 15, H. J. R. 15, 1947.

[14] See, *e. g.*, 25 U. S. News, No. 22, p. 11 (Nov. 26, 1948).

[15] Letter to Charles Hammond, Aug. 18, 1821, 15 Writings of Thomas Jefferson 330, 331 (Memorial ed., 1904).

[16] Letter to Samuel Kercheval, July 12, 1816, 15 *id.* at 32, 34. For similar expressions of Jefferson's alarm at what he felt to be the dangerous encroachment of the judiciary upon the other functions of government, see his letters to William B. Giles, April 20, 1807, 11 *id.* at 187, 191; to Caesar Rodney, Sept. 25, 1810, 12 *id.* at 424, 425; to John Taylor, May 28, 1816, 15 *id.* at 17, 21; to Spencer Roane, Sept. 6, 1819, 15 *id.* at 212; to Thomas Ritchie, Dec. 25, 1820, 15 *id.* at 297; to James Pleasants, Dec. 26, 1821, 12 Works of Thomas Jefferson, 213, 214 (Federal ed., 1905); to William T. Barry, July 2, 1822, 15 Writings, *supra,* at 388; to A. Coray, Oct. 31, 1823,

garchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace.[17] Judges appointed for life whose decisions run counter to prevailing opinion cannot be voted out of office and supplanted by men of views more consonant with it. They are even farther removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure either by periodic reports or by such a modern device for securing responsibility to the electorate as the "press conference." But a democracy need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness by the people there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself.

Our right to pass on the validity of legislation is now too much part of our constitutional system to be brought

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15 *id.* at 480, 487; to Edward Livingston, March 25, 1825, 16 *id.* at 112. See also the passage of Jefferson's Autobiography reprinted in 1 Writings, *supra*, at 120–22. And see Commager, Majority Rule or Minority Rights 28–38 (1943).

[17] In time, of course, constitutional obstacles may disappear or be removed. Yet almost twenty years elapsed between invalidation of the income tax in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, and adoption of the Sixteenth Amendment. And it took twenty years to establish the constitutionality of a minimum wage for women: it was put in jeopardy by an equally divided Court in *Stettler* v. *O'Hara*, 243 U. S. 629, and found unconstitutional in *Adkins* v. *Children's Hospital*, 261 U. S. 525, which was not overruled until *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400. The frustration of popular government, moreover, is not confined to the specific law struck down; its backwash drowns unnumbered projects that might otherwise be put to trial.

into question. But the implications of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness. And so, in the end, it is right that the Court should be indifferent to public temper and popular wishes. Mr. Dooley's "th' Supreme Coort follows th' iliction returns" expressed the wit of cynicism, not the demand of principle. A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution.

MR. JUSTICE RUTLEDGE, concurring.*

I concur in the Court's judgment in No. 34, *Whitaker* v. *North Carolina*. The appellants were convicted under

*[This is also a concurrence in No. 47, *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, and No. 34, *Whitaker* v. *North Carolina*, decided together, *ante*, p. 525.]

a warrant which charged only, in effect, that they had violated the statute "by executing a written agreement or contract" for a closed or union shop.[1] There was neither charge nor evidence that the employer, after the statute became effective, had refused employment to any person because he was not a member of a union. The charge, therefore, and the conviction were limited to the making of the contract. No other provision of the statute is now involved, as the state's attorney general conceded, indeed as he strongly urged, in the argument here. As against the constitutional objections raised to this application of the statute, I agree that the legislature has power to proscribe the making of such contracts, and accordingly join in the judgment affirming the convictions.

In No. 27, *American Federation of Labor* v. *American Sash & Door Company,* and in No. 47, *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Company,* as against the constitutional questions now raised,

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[1] The warrant, insofar as is material, charged that the appellants had entered into ". . . an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in the State of North Carolina and against the public policy of the State of North Carolina, by executing a written agreement or contract by and between said employer and said Labor Unions and Organizations or combinations, whereby persons not members of said unions or organizations are denied the right to work for said employer, or whereby membership is made a condition of employment or continuation of said employment by said employer and whereby said named unions acquired an employment monopoly in any and all enterprises which may be undertaken by said employer are required to become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment by said employer whereby said unions acquire an employment monopoly in any and all enterprises entered into by said employer in violation of House Bill #229, Session 1947, General Assembly of North Carolina, Chapter 328, 1947 Session Laws of North Carolina, and particularly sections 2–3 & 5 thereof, and Chapter 75 of the General Statutes of N. C. . . . ."

I am also in agreement with the Court's decision, but subject to the following reservation. Because no strike has been involved in any of the states of fact, no question has been presented in any of these cases immediately involving the right to strike or concerning the effect of the Thirteenth Amendment. Yet the issues so closely approach touching that right as it exists or may exist under that Amendment that the possible effect of the decisions upon it hardly can be ignored.[2] Strikes have been called throughout union history in defense of the right of union members not to work with nonunion men. If today's decision should be construed to permit a state to foreclose that right by making illegal the concerted refusal of union members to work with nonunion workers, and more especially if the decision should be taken as going so far as to permit a state to enjoin such a strike,[3] I should want a complete and thorough reargument of these cases before deciding so momentous a question.

But the right to prohibit contracts for union security is one thing. The right to force union members to work with nonunion workers is entirely another. Because of this difference, I expressly reserve judgment upon the latter question until it is squarely and inescapably presented. Although this reservation is not made expressly by the Court, I do not understand its opinion to foreclose this question.

MR. JUSTICE MURPHY concurs in this opinion insofar as it applies to Nos. 34 and 47.

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[2] See note 3.

[3] The syllogism might well be: The decisions in the present cases permit a state to make "illegal" any discrimination against nonunion workers on account of that status in relation to securing or retaining employment; strikes for "illegal objects" are "unlawful"; "unlawful" strikes may be enjoined; a strike by union members against working with nonunion employees is a strike for an "illegal object"; therefore such a strike may be enjoined.

JUNGERSEN *v.* OSTBY & BARTON CO. ET AL.

NO. 7. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued November 10, 1948.—Decided January 3, 1949.

1. All of the claims of Jungersen Patent No. 2,118,468, for a "method of casting articles of intricate design and a product thereof," *held* invalid for want of invention. Pp. 561–568.
2. An examination of the prior art as it existed at the time of this alleged invention reveals that every step in the Jungersen method was anticipated; and it appears that Jungersen's combination of these steps was, in its essential features, also well known in the art. Pp. 563–564.
3. Where centrifugal force was common as a means of introducing molten metal into a secondary mould, its use in an intermediate step to force molten wax into a primary mould was not an exemplification of inventive genius such as is necessary to render a patent valid. Pp. 564–567.
4. It is not sufficient to say that jewelry casting is a separate and distinct art where the patent is not restricted to the casting of jewelry and the prior improvements in the art of casting were so obviously applicable to the casting of jewelry that the patentee was bound by knowledge of them. P. 567.
5. Where invention is plainly lacking, the fact that a process has enjoyed considerable commercial success does not render a patent on it valid. Pp. 567–568.

163 F. 2d 312, affirmed in part and reversed in part.
166 F. 2d 807, affirmed.

Nos. 7 and 8. In a suit for a declaratory judgment that a patent was invalid and not infringed, defendant counterclaimed, alleging infringement and seeking an injunction. The District Court held certain claims valid but not

*Together with No. 8, *Ostby & Barton Co. et al.* v. *Jungersen*, on certiorari to the United States Court of Appeals for the Third Circuit, and No. 48, *Jungersen* v. *Baden et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

infringed and certain other claims invalid. 65 F. Supp. 652. The Court of Appeals affirmed. 163 F. 2d 312. This Court denied petitions of both parties for certiorari, 332 U. S. 851, 852; but, after a conflicting decision in another circuit in No. 48, vacated those orders and granted certiorari. 334 U. S. 835. No. 7 *affirmed* and No. 8 *reversed*, p. 568.

No. 48. In a suit for damages, profits and injunctive relief for alleged infringement of a patent, the District Court held all claims of the patent invalid. 69 F. Supp. 922. The Court of Appeals affirmed. 166 F. 2d 807. This Court granted certiorari. 334 U. S. 835. *Affirmed*, p. 568.

William H. Davis argued the cause for Jungersen. With him on the brief was *George E. Faithfull.*

John Vaughan Groner argued the cause for Ostby & Barton Co. et al. With him on the brief was *Edward Winsor.*

MR. JUSTICE REED delivered the opinion of the Court.

The issue here is the validity of United States Patent No. 2,118,468 which covers a "method of casting articles of intricate design and a product thereof."

The patent was granted to Jungersen on May 24, 1938. In 1941, Ostby and Barton Company instituted in the United States District Court for the District of New Jersey an action for a declaratory judgment that the patent was invalid and not infringed. Jungersen, by counterclaim, alleged infringement and sought an injunction. The District Court held Claims 1–4 valid but not infringed and Claims 5–6 invalid because too broad. 65 F. Supp. 652. The United States Court of Appeals for the Third Circuit affirmed on the reasoning of the District

Court. 163 F. 2d 312. We denied petitions by both parties for certiorari. 332 U. S. 851, 852.

In 1944, Jungersen filed suit against Baden in the United States District Court for the Southern District of New York, in which he alleged infringement of the patent and sought damages, profits, and injunctive relief. That court held all the claims invalid. 69 F. Supp. 922. The United States Court of Appeals for the Second Circuit affirmed. 166 F. 2d 807.

Vacating the prior orders which denied it in the Ostby and Barton proceeding, we granted certiorari in both cases in order to settle the conflict. 334 U. S. 835.[1] Since the parties do not assert error in those portions of the lower courts' decisions which concern infringement, the sole issue before us is the validity of the patent.

The method described in the Jungersen patent, Claims 1–4, consists of the following steps: (1) the production of a model of the article to be cast, (2) the formation around this model of a "primary mould" of plastic material "such as rubber" which is "capable of assuming intimate contact with the intricate designs of the model" and which will "retain a lasting shape through subsequent treatment," (3) the casting in this mould of a pattern consisting of molten wax or other material of a low melting point which is made to assume the minute configurations of the mould by means of centrifugal force, (4) the removal of this pattern (which has become solid upon cooling) from the primary mould, and the formation around it of a "secondary mould" of refractory material, such as plaster of Paris, which "will assume all the contours of its intricate design," (5) the removal

[1] In No. 7 we are asked to consider the decision of the Court of Appeals for the Third Circuit as to claims 5 and 6; in No. 8, the decision of that court as to claims 1 through 4; and in No. 48, the decision of the Court of Appeals for the Second Circuit as to all the claims of the patent.

of the wax or similar material from the secondary mould, or "investment" as it is called, by the application of heat, thus melting it out, and finally (6) the casting of the desired molten metal into the cavity in the investment by the application of centrifugal force as in (3), above.

This method is capable of producing "small metal articles, particularly articles of intricate detail such as jewelry which frequently are designed with hollows, undercut portions and perforations, so that they will have a smooth clean surface faithful in detail to the original and free from imperfections or holes, and to enable such result being accomplished with the minimum of expense." The patentee claims that it made possible the accurate reproduction of intricate designs in far less time than had previously been required.

Claim 5 describes in more general terms the formation of a primary mould around the original pattern, the removal of the pattern from the mould, the introduction of molten wax into the mould "by force sufficient to deposit the material into the depression or depressions of the primary mould" and the employment of the wax pattern for the manufacture of a casting mould. Claim 6 covers "an article of jewelry" of intricate design made by the process disclosed by Claim 5. It describes the article of jewelry only by reference to the process by which it is manufactured. Obviously if the first four claims are invalid, the last two must likewise fall.

An examination of the prior art as it existed at the time of this alleged invention reveals that every step in the Jungersen method was anticipated. We think that his combination of these steps was, in its essential features, also well known in the art.

Jungersen's process is nothing more than a refinement of a method known as the "cire perdue" or "lost wax" process, which was in use as early as the sixteenth cen-

tury.[2] The *Treatises of Benvenuto Cellini on Goldsmithing and Sculpture,* pp. 87–89, reveals a process which consists of filling a primary mould with molten wax, building a secondary mould around the wax model thus obtained, melting the wax from this mould and pouring the desired metal in the secondary mould. In 1904 United States Patent No. 748,996, issued to Spencer, described a substantially identical process in which the primary mould was made, as in the patent here involved, by vulcanizing rubber around the original model or pattern. In England a process similar to Spencer's had been the basis of a patent issued to Haseltine in 1875.[3]

The above-described developments in the prior art suggested no limitation of their applicability to any particular type of casting. Spencer stated that the purpose of his process was to produce accurate replicas of the original pattern, which could be of "intricate form" and which could "have any number of sides or surfaces or undercut or projecting parts." Haseltine described his object as the production of "a casting in metal from a given pattern, which casting will be a perfect copy of such pattern without requiring much, if any, after finishing or chiselling work."

The patentee claims that the invention in his combination lies in the use, in conjunction with the "lost wax" process, of centrifugal force. Long before the issuance of this patent, however, those skilled in the art recognized and disclosed the necessity for the application of force in order to make molten materials fit snugly the

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[2] 20 Encyclopaedia Britannica (1948), p. 229.

[3] British Patent No. 2467.

[1] A French publication by Verleye entitled "La Gravure, etc." (1924) describes in detail all of the elements of Jungersen's process except the use of centrifugal force.

intricate details of the mould. Haseltine applied pressure of about twenty pounds per square inch to cause the molten metal "to lie to the dense mould and produce a sharp and well defined casting." He accomplished this by introducing the metal into the mould through a pipe about six feet in height.[4] United States Patent No. 1,238,789 issued to Kralund in 1917 teaches the application of pressure to the wax and the molten metal by means of an ordinary pressure die casting apparatus.

Whether these types of pressure are the equivalent of centrifugal force we need not decide since it is evident from patents and publications that the use of the latter was well known in the art. In 1923 McManus patented a casting machine which was adapted "to the casting of jewelry, such as gold rings, small trinkets, etc., where metal or other dies or moulds may be . . . filled by centrifugal casting methods." United States Patent No. 1,457,040. He claimed "a means for transferring fused material from the furnace [in which the material was melted] to the mould under the action of centrifugal force." In a paper on current casting methods which he presented to the Institute of Metals in England in 1926, one George Mortimer, with reference to the difficulty in filling a mould by gravity, stated:

> "It was natural, therefore, that engineers should early turn their attention to some form of artificial pressure, whereby the mould could be filled by force, and soundness and clean definition seemingly assured.
>
> "The simplest form of artificial pressure is that of centrifugal force . . . ." [5]

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[4] "La Gravure, etc.," *supra,* note 3, advocates the use of steam pressure.

[5] 35 Journal of the Institute of Metals, 371, 377.

Centrifugal force was commonly used in dental casting prior to 1938.[6]

Thus it is clear that the "lost wax" process, the use of a flexible primary mould, and the use of centrifugal force were all old in the art of casting. The patentee claims that the centrifugal forcing of wax into the primary mould had never before been combined with the other features of his process. We think this fact is of no legal significance. Where centrifugal force was common as a means of introducing molten metal into the secondary mould, its use in an intermediate step to force molten wax into the primary mould was not an exemplification of inventive genius such as is necessary to render the patent valid. Cf. *Lincoln Engineering Co.* v. *Stewart-Warner Corp.*, 303 U. S. 545; *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84. The patentee himself admitted that the same principle was employed in both steps.[7] Thus Jungersen employed in his claimed invention well-known skills and practices in a manner and

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[6] "Dental-casting methods employ four distinct principles; namely, gravity, centrifugal, vacuum, and pressure. . . .

"The centrifugal method has the advantage of great simplicity, and fills the mold by the force exerted in throwing the metal off on a tangent while being revolved about a center." Stern, Die-casting Practice (1st ed., 1930), p. 10.

[7] An excerpt from the testimony follows:

"Q. And when the machine is revolved, when it is centrifuged, it makes no difference whether it be molten wax or molten metal, does it, in the fact that it throws out the molten material into the gate? A. It would throw out anything of weight if it is made free to leave.

"Q. And that applies to wax as well as metal, does it not? A. It applies to wax and metal, but in a greater amount to the metal than to the wax.

"Q. But they both operate in the same way under the influence of the centrifugal machine? A. The same principle is used, yes.

"Q. And the molten material in both cases is introduced into the mold? A. Yes."

for a purpose long familiar in the field of casting. His claimed improvement is therefore not patentable.

The patentee contends, however, that jewelry casting is a separate and distinct art; that consequently the advancements in other types of casting mentioned above cannot be viewed as the prior art in reference to this patent. The answer to this is twofold. In the first place, this patent is not restricted to the casting of jewelry. Its stated object is to "facilitate the casting of small metal articles, particularly articles of intricate detail such as jewelry . . . ." Secondly we think that the improvements in the art of casting which were disclosed by the patents and publications discussed above were so obviously applicable to the type of casting sought to be effected by Jungersen that he was bound by knowledge of them. *Mandel Bros.* v. *Wallace,* 335 U. S. 291, 295–96.

Numerous licenses under the patent were issued in the United States and other countries. The fact that this process has enjoyed considerable commercial success, however, does not render the patent valid. It is true that in cases where the question of patentable invention is a close one, such success has weight in tipping the scales of judgment toward patentability. *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275, 279, and cases cited in footnote 5 thereof. Where, as here, however, invention is plainly lacking, commercial success cannot fill the void. *Dow Chemical Co.* v. *Halliburton Co.,* 324 U. S. 320, 330; *Toledo Pressed Steel Co.* v. *Standard Parts, Inc.,* 307 U. S. 350, 356–57; *Textile Machine Works* v. *Hirsch Co.,* 302 U. S. 490, 498–99; 1 Walker, Patents (Deller, 1937) § 44. Little profit would come from detailed examination of the cases cited above or those indicated by reference. Commercial success is really a makeweight where the patentability question is close.

Increased popular demand for jewelry or alertness in exploitation of the process may well have played an important part in the wide use of the patent. We cannot attribute Jungersen's success solely or even largely to the novelty of his process.

We hold all the claims of the patent invalid for want of invention.

Nos. 7 and 48 *affirmed.*
No. 8 *reversed.*

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE BURTON joins, dissenting.

This is not one of those patent controversies that carry serious consequences for an important industry and thereby for the general public. The case does, however, raise basic issues regarding the judiciary's role in our existing patent system. These issues were stated by Judge Learned Hand when the litigation was before the Court of Appeals for the Second Circuit. Since this Court's opinion has not, to my mind, met the questions which he raised, and since I cannot improve upon what Judge Learned Hand wrote, I adopt his opinion as mine.

> "In Jungersen's British patent, as my brothers truly say, he based his invention solely upon forcing the wax and the metal into completely intimate contact with every crevice of the mould, and for this he disclosed a centrifuge as the means. Moreover, it had already been known by other moulders of fine patterns that the metal might not fill all the spaces necessary for perfect reproduction. For example, in 1873 Haseltine disclosed a device which set up a pressure of twenty pounds to the square inch; and this too in a 'lost wax' process. True, he did not disclose using similar pressure for the wax, and he did not use a centrifuge; but McManus used a cen-

trifuge to force fusible metal into all the crevices of the mould, and that too in a 'lost wax' process, the knowledge of which he appears to have assumed, for he does not disclose how to make the wax model. Kralund also showed a pressure die-casting process, as applied to the 'lost wax' method; and he used pressure to force his wax into intimate connection with the first die as well as upon the molten metal of the final casting: but his original die was of steel and he does not describe its manufacture.

"Nevertheless, in spite of all these approaches, and of the fact that all the elements of the disclosure were to be found in the prior art, it remains true that Jungersen's process in its entirety had never been assembled before; no one had ever thought of combining all those steps in a single sequence. True, had the combination not been new in this objective sense, it could not have been patented merely by turning it to a new use; and that would have been so, although it might have taken as much originality to see that it could be put to the new use, as it takes to make an outstanding invention. It would have been a final answer that Congress has never seen fit to extend its constitutional power to 'discoveries' as such, and has limited patents to an 'art, machine, manufacture, or composition of matter,'[1] as we have often said—the last time in Old Town Ribbon & Carbon Co., Inc., v. Columbia Ribbon & Carbon Manufacturing Co.[2] My point is that, if there is a new combination, however trifling the physical change may be, nothing more is required than that, to take the step or steps, added 'invention,' is needed; and 'invention,' whatever else it may be, is within

[1] § 31, Title 35 U. S. C. A.

[2] 2 Cir., 159 F. 2d 379, 382.

the category of mental activities and of those alone. In the case at bar the answer must therefore depend upon how we shall appraise the departure from what had gone before in terms of creative imagination; indeed, I do not understand what other test could be relevant.

"If that be the test, I submit that Jungersen's process meets it. From time immemorial jewelry had been manufactured by the earlier processes; so that the need, if need there was, had existed for years. Moreover, two of those earlier processes—'cuttlefish casting and sand-casting'—have now become 'of little commercial significance'; 'die-stamping' and Jungersen's process 'are the only substantial methods now commercially used'; and in the manufacture of a hundred rings or less 'die-stamping' is more expensive. Had some technological advance held up the change, and had Jungersen made it only a short time after the obstacle had been removed, I should agree that the inference of outstanding originality would have been greatly weakened; but that was not the fact. Indeed, it is the very basis of the defence that for years all the elements lay open and available, and that nothing was needed but the paltry modification which has proved so fruitful. To that I make the answer on which courts in the past used to ring the changes with wearisome iteration. If all the information was at hand, why was the new combination so long delayed? What better test of invention can one ask than the detection of that which others had all along had a strong incentive to discover, but had failed to see, though all the while it lay beneath their eyes? True, the whole approach to the subject has suffered a shift within the last decade or so, which I recognize that

> we should accept as authoritative. Moreover, I am not aware of the slightest bias in favor of the present system; I should accept with equanimity a new system or no system. However, I confess myself baffled to know how to proceed, if we are at once to profess to apply the system as it is, and yet in every concrete instance we are to decide as though it did not exist as it is. In the case at bar, I can only say that, so far as I have been able to comprehend those factors which have been held to determine invention, and to which at least lip service continues to be paid, the combination in suit has every hall-mark of a valid patent."

Judge Hand's opinion is reported at 166 F. 2d 811.

MR. JUSTICE JACKSON, dissenting.

I think this patent meets the patent statute's every requirement. And confronted by this record an industry heretofore galled by futility and frustration may well be amazed at the Court's dismissal of Jungersen's ingenious and successful efforts.

Of course, commercial success will not fill any void in an invalid patent. But it may fill the void in our understanding of what the invention has meant to those whose livelihood, unlike our own, depends upon their knowledge of the art. Concededly, in this high-pressure age sales volume may reflect only powerful promotion or marketing magic, and its significance as an index of novelty or utility may rightly be suspected. But Jungersen's success was grounded not in the gullibility of the public but in the hard-headed judgment of a highly competitive and critical if not hostile industry. Knowing well its need for and its failure to achieve improvements on available processes, that industry discarded them, adopted this outsider's invention, and made it a commercial success.

It would take a singular self-assurance on the part of one who knows as little of this art as I do, or as I can learn in the few hours that can be given to consideration of this case, to ignore the judgment of these competitors who grew up in the industry and say that they did not know something new and useful when they saw it. And if Benvenuto Cellini's age-old writings are so revealing to us laymen of the appellate Bench, it is hard to see why this practical-minded industry which the Court says was following Cellini failed through all the years to get his message.

It would not be difficult to cite many instances of patents that have been granted, improperly I think, and without adequate tests of invention by the Patent Office. But I doubt that the remedy for such Patent Office passion for granting patents is an equally strong passion in this Court for striking them down so that the only patent that is valid is one which this Court has not been able to get its hands on.

I agree with the opinion of Judge Learned Hand below.

AYRSHIRE COLLIERIES CORP. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

No. 25. Argued November 12, 15, 1948.—Decided January 3, 1949.

Two proceedings under § 15 (7) of the Interstate Commerce Act involved rail rates on bituminous coal between producing areas long grouped for rate-making purposes in Indiana, Illinois and western Kentucky, and destinations in northern Illinois and Beloit, Wis. One resulted from a proposal of certain carriers to increase rates between certain points. The other was an investigation instituted by the Commission into existing intrastate rates between certain points in Illinois, to determine whether they were discriminatory, preferential and prejudicial against interstate commerce and in favor of intrastate commerce. After hearing and considering both proceedings together on the same record, the Commission found that certain existing and proposed rates would result in unjust discrimination and undue preference and prejudice in violation of §§ 2 and 3 of the Act. It issued an order in which it disapproved a dual basis of rates, specified rates which it approved, and ruled that the proposed rates would be unreasonable to the extent that they exceeded the approved rates. *Held:*

1. In these proceedings, the Commission had authority to determine the lawfulness of existing rates as well as the proposed new rates. Pp. 581–583.

2. The Commission was justified in concluding that the present and proposed system of dual rates, under which single-line rates from certain points in a group to certain destinations were substantially lower than joint-line rates from other points in the same group to the same destinations, was an unjust discrimination within the meaning of § 2 and would create an undue preference and prejudice as between different points in the same groups in violation of § 3 (1) of the Act. Pp. 583–587.

(a) The preferential treatment of shippers at some points in a group as against shippers at other points in the same group was an unjust discrimination within the meaning of § 2. Pp. 585–587.

(b) In view of the fact that the whole system of rate making on a group basis was not challenged in these proceedings, the Com-

mission's conclusions that the establishment of a dual basis of rates for this coal-mining region defeats the system of grouping by unjustly discriminating against some shippers and in favor of others in the same group and that this unjust discrimination can be avoided only by the establishment and maintenance of a single rate basis cannot be challenged successfully on this record. P. 587.

3. The Commission was justified in finding that the differentials maintained by certain carriers as between certain of the Indiana groups constituted an undue preference and prejudice in violation of § 3 (1) of the Act and in prescribing fair and reasonable differentials between the Indiana groups and the Illinois groups. Pp. 588–593.

(a) In the circumstances of this case, the Commission was justified in using averages as a measure of the relationship between the rates of the Indiana groups on the one hand and the Illinois groups on the other, even though the resulting differentials were not based strictly upon the factor of distance. Pp. 588–591.

(b) In considering these rates, the Commission was justified in taking into consideration the element of competition. P. 592.

(c) It also has the consumer interest to safeguard as well as that of producers and carriers. P. 592.

(d) In fashioning a differentially related and finely balanced rate structure in this complex situation, the Commission has a broad discretion in accommodating the factors of transportation conditions, distance and competition, so long as no statutory requirement is overlooked. P. 593.

4. Having undertaken to curb unlawful practices by prescribing just and reasonable rates pursuant to §§ 15 (1) and 15 (7), the Commission did not exceed its authority by failing to afford the carriers alternative methods of removing the discrimination which was found to exist. Pp. 593–594.

5. Having found a forbidden discrimination or preference in rates, the Commission could remove it without finding that the preferential rates were noncompensatory. P. 594.

Affirmed.

Having found that certain existing and proposed rail rates on shipments of bituminous coal would result in unjust discrimination and undue preference and prejudice, the Interstate Commerce Commission issued an

order in which it disapproved a dual basis of rates, specified rates which it approved, and ruled that the proposed rates would be unreasonable to the extent that they exceeded the approved rates. 263 I. C. C. 179. A three-judge District Court dismissed two complaints seeking to set this order aside. On appeal to this Court, *affirmed,* p. 594.

Earl B. Wilkinson argued the cause for Ayrshire Collieries Corp. et al., appellants. With him on the brief was *J. Alfred Moran.*

Carson L. Taylor argued the cause for the Chicago, Milwaukee, St. Paul & Pacific Railroad Co., appellant. With him on the brief were *A. N. Whitlock* and *M. L. Bluhm.*

Daniel W. Knowlton argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson* and *Edward Dumbauld.*

Erle J. Zoll, Jr. argued the cause for the Alton Railroad Co. et al., appellees. With him on the brief were *A. E. Funk,* Attorney General of Kentucky, *M. B. Holifield,* Assistant Attorney General, *Charles W. Stadell* and *J. E. Marks. Richard F. Wood* was of counsel for Belleville Fuels, Inc. et al., appellees.

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal, 38 Stat. 219, 220, 28 U. S. C. §§ 45 and 47a, 43 Stat. 938, 28 U. S. C. § 345 (4), from a decree of a three-judge District Court, which dismissed as with-

out merit two complaints seeking to set aside a rate order of the Interstate Commerce Commission.[1]

Bituminous coal is produced in great quantities in Indiana, Illinois and western Kentucky. In each State there are producing areas that have long been grouped for rate-making purposes. These groups or districts are the Brazil-Clinton, the Linton-Sullivan, the Princeton-Ayrshire, and the Boonville in Indiana; the Northern Illinois, the Fulton-Peoria, the Springfield, the Belleville, and the Southern in Illinois; and the Western in Kentucky. Group rates have been established by the carriers so that all mines within each producing area are accorded the same rates to the same consuming destinations.[2] The result is that comparative distances of the mines in one producing area from a particular consuming destination are commonly disregarded in fixing the group rate. But the Commission has long concluded that such a system of rate making for coal and other natural resources encourages competitive production and a more even development of an area.[3]

The present litigation involves group rates for carload lots from the foregoing groups in Indiana, Illinois, and

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[1] A prior decree sustaining this order of the Commission was reversed by the Court because one member of the three-judge District Court had not participated in the decision. *Ayrshire Corp.* v. *United States*, 331 U. S. 132.

[2] Another characteristic of coal rate structures has been the rate differentials. For example, Brazil is the base group in Indiana on coal traffic to the Illinois and Wisconsin destinations involved in this litigation. Hence the rates, expressed in cents per ton, from the other Indiana groups are stated in terms of differences from the Brazil group rate.

[3] See *Hitchman Coal & Coke Co.* v. *Baltimore & O. R. Co.*, 16 I. C. C. 512, 520; *Waukesha Lime & Stone Co.* v. *Chicago, M. & St. P. R. Co.*, 26 I. C. C. 515, 518; *Wisconsin & Arkansas Lbr. Co.* v. *St. Louis, I. M. & S. R. Co.*, 33 I. C. C. 33, 37–38; *Public Utilities*

Kentucky to Rockford, Freeport, Dixon and other points in northern Illinois and to Beloit, Wisconsin.

The order under attack in this case resulted from two proceedings before the Commission which were heard and considered together on the same record. One was an investigation in which carriers proposed certain increases in rates for carload lots of bituminous coal from some of the Indiana groups to Beloit, Wisconsin, and from all of the Indiana groups to designated Illinois destinations. Like increases in the Illinois intrastate rates to the same Illinois destinations were also sought. These proposed increases have been suspended until disposition of the proceeding. The other proceeding was an investigation instituted by the Commission, on complaint, into the intrastate carload rates from the Illinois groups to the same Illinois destinations to determine whether they were discriminatory, preferential, and prejudicial against interstate commerce and in favor of intrastate commerce.

These proceedings are only a recent chapter in the problem of adjustment of the coal rates for this region.

The Illinois Commerce Commission ordered a reduction of the intrastate rates in 1930. This resulted in a reduction of certain interstate rates from Indiana and western Kentucky to Rockford and other northern Illinois points. The Interstate Commerce Commission refused to require an increase in intrastate rates to the important Illinois destinations involved here unless the rates from the Indiana groups to the same destinations were increased.[4]

Commission v. *Oregon Short Line R. Co.*, 33 I. C. C. 103, 106; *Southwestern Interstate Coal Operators' Assn.* v. *Arkansas W. R. Co.*, 89 I. C. C. 73, 84–85. And see *New York Harbor Case*, 47 I. C. C. 643, 712; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 486.

[4] See *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537, 549–550.

Subsequently the Commission found that the rates from the Illinois, Indiana and western Kentucky groups to Beloit, Wisconsin, were in the main not unreasonable but that they were unduly prejudicial to Beloit and unduly preferential to Rockford, if they exceeded the rates from the same origins to Rockford by more than 25 cents. The Commission also found on further hearing that the rates from certain of the Illinois groups to Beloit, Wisconsin, were not unreasonable but that they were unduly prejudicial to Beloit and unduly preferential to Rockford to the extent that they exceeded the Rockford rates by more than 15 cents. The Commission allowed the carriers to increase the rates to Rockford or to reduce the rates to Beloit, or both, in order to relate the rates to Beloit 15 cents over Rockford. But the intrastate rates to Rockford had been prescribed as a maximum by the Illinois Commission and therefore could not be increased. Also to increase the interstate rates without similar increases from the Illinois groups would be disruptive of the rate structure built on the group basis. Accordingly the rates to Beloit were reduced.[5]

The carriers subsequently proposed increases in the rates from the Indiana groups and the Illinois groups to Rockford and other Illinois points and, with certain exceptions, from the Indiana groups to Beloit, Wisconsin. These increases conformed to the 15-cent relation be-

[5] The history of this rate problem is briefly summarized by the Commission in its report on the present case. 263 I. C. C. 179. For earlier aspects of it see *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537; *Fairbanks-Morse & Co.* v. *Alton & S. R.,* 195 I. C. C. 365, 251 I. C. C. 181; *Illinois Coal Traffic Bureau* v. *Ahnapee & W. R. Co.,* 204 I. C. C. 225; *Coal to Illinois and Wisconsin,* 232 I. C. C. 151. And see *Coal from Indiana to Illinois,* 197 I. C. C. 245, 200 I. C. C. 609, the order in which, as we discuss hereafter in the opinion, was held invalid by *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499.

tween Rockford and Beloit but placed the rates (both interstate and intrastate) more nearly at the general level of interstate rates in that territory.

One other fact must be mentioned if the present posture of this rate problem is to be understood. After the Illinois intrastate rates were reduced in 1930 and after the carriers' unsuccessful effort to have the earlier ones reestablished, the Milwaukee road proposed to reduce its single-line rates from mines in the Brazil and Linton groups which it serves to Rockford, Freeport and other intermediate Illinois points by the amount of the Illinois intrastate reduction. The Commission ordered the proposed rate to be cancelled. The Court affirmed a decree of a District Court which permanently enjoined the order of the Commission. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499.

Since that time the rates of the Milwaukee from origins on its line in the Brazil and Linton groups to Rockford and other intermediate points in Illinois have been lower than the contemporaneous rates of carriers serving other origins in these respective groups to the same destinations, with the exception of the Illinois Central which in 1936 published rates from the Linton group to Rockford and other intermediate Illinois points on its lines on the same basis as the Milwaukee's single-line rates.

The Milwaukee and the Illinois Central serve only a part of the mines in the Brazil and Linton groups. But they carry coal from other mines in those groups even though their lines do not reach them, since they are either connecting carriers of lines that do or destination carriers. They are therefore parties to many joint rates. But the joint rates do not reflect reductions which the Milwaukee and Illinois Central made in their single-line rates. And the rate increases proposed, and suspended by the Commission on the present proceedings, continued that previ-

ous relationship. Moreover the proposed dual basis of rates to Rockford and other Illinois destinations reached by the Milwaukee was proposed to be extended to Beloit, which previously had enjoyed the same rates from all the mines in the Brazil and Linton groups.

As we have noted, the new proposed rates respected the 15-cent differential of Beloit over Rockford. The result was a substantial increase in the joint-line rates from the Brazil and Linton groups to Beloit as well as to Rockford. But Milwaukee's single-line rates were increased 15 cents to Rockford and none to Beloit. The result would be to accord to mines in the Brazil and Linton groups that were on the Milwaukee lines rates lower to Beloit by 17 and 12 cents, respectively, than accorded the other mines in the two groups. Furthermore the new proposed rates would establish a dual basis of rates to Beloit from the Princeton group as well.

The Commission disapproved the dual basis of rates. It considered what would be the fair and reasonable rate relations as between the respective origins in the several groups and as between the groups themselves. It found that present and proposed rates of the Milwaukee and Illinois Central from Indiana to the northern Illinois destinations would result in unjust discrimination as between shippers and receivers of coal and undue preference and prejudice as between the origins in the Brazil and Linton groups and as between the respective Indiana groups. It made the same findings as respects the Milwaukee's proposed rates from the Brazil, Linton and Princeton groups to Beloit; and in that connection it also found that those rates would result in undue preference and privilege as between the Indiana groups on the one hand and the Illinois groups on the other. The Commission went on to specify rates which it approved. It ruled that the proposed rates would be unreasonable to

the extent that they were above the approved rates.[6] 263 I. C. C. 179.

We agree with the District Court that the complaints must be dismissed.

First. It is contended that the Commission in this proceeding had authority to determine the lawfulness only of the proposed rates, not of the present rates.

This proceeding is an investigation and suspension proceeding under § 15 (7) of the Interstate Commerce Act, 44 Stat. 1447, 49 U. S. C. § 15 (7). That section, which gives the Commission broad authority upon complaint or its own initiative to investigate and determine the lawfulness of any new rate,[7] provides that "after full hearing, whether completed before or after the rate . . . goes into effect, the commission may make such order with ref-

[6] The order entered by the Commission in the proceeding to determine whether the intrastate rates were unjustly discriminatory against interstate commerce is not under attack here. It required the carriers to desist from practices which the Commission found to be discriminatory and to establish and maintain, for the intrastate transportation of coal, rates no lower than the approved rates.

[7] "Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would

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erence thereto as would be proper in a proceeding initiated after it had become effective."

The power of the Commission to deal with the situation as if the proposed new rates had become effective is necessarily a comprehensive one. It seems too plain for argument that such broad authority is ample for the modification of either proposed or existing rates or both. The power granted the Commission under § 15 (1) to deal with rate schedules already effective supports that view.[8] For once the Commission finds the rate to be unjust or

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otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective."

[8] "That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum

unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise unlawful, the Commission is granted the power under § 15 (1) to determine and prescribe the just and reasonable rate. The Commission is not bound either to approve or disapprove *in toto* the new rates that are proposed. It can modify the proposal in any respect and require that the proposed rates as modified or wholly different rates be substituted for the present ones. That has been the view of the Commission since the beginning;[9] and we think it is the correct one.

The same result obtains as respects the Milwaukee's single-line rates from origins on its lines in the Brazil and Linton groups to Beloit, Wisconsin. The Milwaukee had not proposed any change in those rates. But those rates had been republished in the proposed schedules. They were among the rates suspended by the Commission. And the Commission's order of investigation cited the Milwaukee tariff that contains those rates. Hence the Commission sought to bring them into the investigation and gave Milwaukee all the notice to which it was entitled. That the Commission had authority to include them seems clear to us. Even though we assume they are not "new" rates within the meaning of § 15 (7), they are rates "demanded, charged, or collected" within the meaning of § 15 (1).

Second. Section 2 of the Act makes it unlawful for a carrier to receive from one person a greater or less compensation for transporting property than it receives from another for doing a "like and contemporaneous service in the transportation of a like kind of traffic under

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or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

[9] See *Advances in Rates—Western Case,* 20 I. C. C. 307, 314; *Lignite Coal from N. Dakota,* 126 I. C. C. 243, 244.

substantially similar circumstances and conditions." [10] It is pointed out that the purpose of this section is to enforce equality between shippers of like commodities over the same line or haul for the same distance and between the same points.[11] This requirement, it is argued, has not been met in the present case since there is no finding that any of the coal from any origin point to any destination was being charged a higher rate than other coal from the same origin point to the same destination moving over the same line under substantially similar circumstances and conditions. The contention would be well taken if the Commission was not warranted in treating all places within a particular group or district as one origin point. Whether or not the Commission was warranted in doing so, depends primarily on the legality of its action in gathering together various origin points into one rate group for rate-making purposes.

As we have noted [12] that has been an historic method of building coal rate structures. The Commission followed that method in this case because in its opinion

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[10] "That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

[11] See *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U. S. 263, 280; *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S. 144, 166; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6.

[12] See note 3, *supra*.

such a rate structure was necessary to afford consumers, coal operators, and carriers a fair opportunity to compete in the purchase, sale and transportation of coal from the mines in the various groups or districts to the destinations in question. The Commission's power so to act is not challenged here. Yet once the legality of the grouping of mines for rate purposes is accepted, the result is clear. For the protection of one shipper against unjust discrimination in favor of another within the same group is as clearly within the purpose of § 2 as the protection of one factory against unjust discrimination in favor of another in the same community.

The Milwaukee and Illinois Central were granting more favorable rates to some origins than to others in the same groups or districts. Their single-line rates from mines on their own lines were much lower than joint-line rates from other mines in the same group to the same destinations. The latter are rates published by other carriers and in which Milwaukee and Illinois Central join. Milwaukee and Illinois Central therefore are parties to an arrangement which results in some mines getting lower rates than other mines in the same group on shipments to the same destinations.

The question remains whether that preferential treatment of shippers at some origins was an unjust discrimination within the meaning of § 2.

The single-line rates of Milwaukee and Illinois Central from the Linton group to northern Illinois destinations were 12 cents lower than the joint-line rates to the same points from other mines in the Linton group. The like differential as respects the Brazil group was 17 cents. The proposed schedules continued that dual basis of rates and extended it to Beloit, Wisconsin. The Commission made what seems to us a permissible inference, that rates favorable to the mines on the single-rate routes played an important part in getting the great bulk of

the tonnage from the roads having the higher joint rates. Thus Milwaukee served only 4 of the 30 mines in the Brazil group and only 9 of the 31 in the Linton group. But in what the Commission called a representative period, Milwaukee handled under its single-line rates over 95 per cent of the tonnage moving from Brazil to Rockford and over 78 per cent of that from Linton to Rockford. The Commission concluded that the maintenance of the dual basis of rates therefore had an important bearing on the future opportunities of shippers within the respective groups to market their coal in the destination territory. It found that there was severe competition in marketing coal in this territory and that a differentially related and finely balanced rate structure on the coal was necessary in order to meet the needs of the consuming public, the mine operators, and the carriers. For, in general, all of the mines in these groups produce coal of the same quality and grade. A difference of a few cents per ton in the transportation charge is normally sufficient to divert a coal contract from one mine to another. Yet the Commission found that the transportation conditions over the single-line routes do not differ materially from those over the joint-line routes to the same destinations from other mines in the same group; that there is no important difference in the average distances over those respective routes.

The latter findings, especially the one respecting the similarity of transportation conditions, are severely challenged as being without any support in the evidence. These findings, when judged by the classic examples of unjust discrimination between shippers, leave much to be desired. But we think they are adequate in this case. They reflect an intimate acquaintance by the Commission with the grouping of mines for rate-making purposes. See 263 I. C. C., p. 196. The groups are themselves designed to equalize competitive opportunities. The lo-

cation of the mines, their distances from destination territory, the transportation conditions over the lines that serve the various origins within a group—these are all factors which bear on the determination of what mines shall be pulled together into one group. The Commission can draw from its long experience with these groupings to determine whether any variables in transportation conditions warrant a difference of rates as between mines within one group to a common destination. Or to state it otherwise, the attack here could not succeed unless it were on the respective groupings themselves. The appellants, of course, claim the right to initiate rates within the zone of reasonableness. See *United States* v. *Chicago, M., St. P. & P. R. Co., supra.* But the Commission holds that when that power is used to establish a dual basis of rates for this coal mining region, it defeats the system of grouping by unjustly discriminating against some shippers and in favor of others in the same group. The Commission's conclusion that only by the establishment and maintenance of a single-rate basis can that unjust discrimination be avoided is an informed judgment based on a complex of many factors. It cannot be successfully challenged on this record unless the whole system of rate making on a group basis is undermined. But no such major project is undertaken.

What we have just said also disposes of the attack which is made on the findings and conclusion of the Commission that the present and proposed system of dual rates creates an undue preference and prejudice as between the origins in the Brazil and Linton groups in violation of § 3 (1) of the Act.[13]

[13] "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traf-

Third. The Commission found that the differentials maintained by the Milwaukee and Illinois Central as between certain of the Indiana groups constituted an undue preference and prejudice in violation of § 3 (1) of the Act.[14]

The Commission found that the differential, Linton over Brazil, should be 10 cents. This is the standard differential, in effect generally to the northwest. It found that the standard differential, Princeton over Linton, was 7 cents. Milwaukee's differential in the former would be 22 cents; and the differential of the Milwaukee and Illinois Central in the latter would be 19 cents. The main attack of appellants on this phase of the case is the Commission's conclusion that these differentials are greater than those warranted by the respective differences in distances. Facts are adduced to show that they fairly reflect differences in distances.

But the Commission made plain that in considering the whole problem of rate relations presented by this case it did not rely strictly upon distance. Distance was a factor but it was not controlling. The Commission deemed its task to be the creation of a rate structure that would afford a fair opportunity to compete in the purchase, sale and transportation of the coal from the various mines to the destinations in question.

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fic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ."

[14] "The Milwaukee and the Illinois Central join in rates from the Princeton and Boonville groups to these northern Illinois destinations which reflect differences between those groups on the one hand, and the Brazil and Linton points served by those two respondents on the other, that are substantially greater than the so-called standard differentials and greater than are warranted by the respective differences in distance."

The propriety of that action of the Commission is determinative of another phase of the case as well. It goes to the heart of appellants' objections to the differentials prescribed by the Commission as fair and reasonable as between the Indiana groups and the Illinois groups.

The Commission approved rates from the Indiana groups to twelve Illinois destinations which averaged $1.95 from Brazil, $2.05 from Linton, and $2.12 from Princeton-Boonville. These rates, the Commission found, compared favorably with the proposed rates to the same destinations from the Illinois groups,[15] apart from exceptions not now material.

The chief problem of the Commission in this case was to provide a rate structure which would afford fair and reasonable relations of rates to northern Illinois destina-

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[15] The Commission in determining maximum reasonable rates from the Fulton-Peoria group to Iowa destinations developed the so-called Midland scale. See *Midland Electric Coal Corp.* v. *Chicago & N. W. R. Co.*, 232 I. C. C. 5. It used the so-called Indiana-Illinois scale for the same purpose in connection with certain Indiana groups to eastern-central Illinois destinations. See *Coal Trade Assn.* v. *Baltimore & O. R. Co.*, 190 I. C. C. 743. In the present case the Commission made certain adjustments in those scales, see 263 I. C. C. at 186, and used them in the comparison of the approved Indiana rates with the approved Illinois rates. Those combined rates for Indiana to twelve northern Illinois destinations average 86.1 per cent of the Indiana-Illinois scale and 70.7 per cent of the Midland scale, while the combined rates for the Illinois groups to those destinations averaged 85.4 per cent and 70.3 per cent of those scales.

The Commission approved rates of $2.22 from Brazil to Beloit, Wisconsin, $2.32 from Linton, and $2.39 from Princeton-Boonville, rates which the Commission found compared favorably with the present rates from the Illinois groups to Beloit. Taken as a whole, the approved rates from Indiana to Beloit averaged 94.3 per cent of the Indiana-Illinois scale and 77.1 per cent of the Midland scale, while the combined present rates from the Illinois groups to Beloit average 92.9 per cent and 76.6 per cent of the respective scales.

tions, both as between the respective origin groups and as between Indiana groups and Illinois groups. There had been historically no fixed relation either between the former or the latter. And the appearance of a dual basis of rates greatly distorted the picture. The Commission did in this case what the Court pointed out in *United States* v. *Chicago, M., St. P. & P. R. Co., supra,* at 510, it had not done there, *viz,* it adjudged the fairness of the relation subsisting between Illinois and Indiana rates.

Appellants however contend that what the Commission did was wholly arbitrary. They point to instances where the rate from an Indiana group is more than the rate from an Illinois group even though the haul is shorter. They say that what the Commission did was to adjust the rates not to compensate for the transportation service rendered but to favor Illinois groups over Indiana groups. They give illustration after illustration of the inconsistencies between the specific rates, assuming, as the Commission found, that the transportation conditions which were involved were the same. From that argument appellants seek to make two points—(1) that the rates approved by the Commission do not reflect group differentials designed to eliminate discrimination and preference and (2) that, even though they do, individual rates are established that are wholly arbitrary in violation of the principle that each destination is entitled to a reasonable rate.

We cannot deny the Commission authority to use averages as a measure of the relationship between the rates of the Indiana groups on the one hand and the Illinois groups on the other. The averages would be some indication of the closeness of the alignment. The important comparison here is in the regional or group differentials. These differentials in the present case were not designed so as to be faithful to the factor of distance. The Commission followed the common practice in giving diminish-

ing weight to distance and increasing weight to competition as the length of the haul increased. The Commission said, 263 I. C. C. at 204,

> "In approving the foregoing rate relations, we have kept in mind the importance to consumers, coal operators, and railroads of relating these differentially related coal rates, not strictly upon distance, but so as to afford all concerned a fair opportunity to compete in the purchase, sale, and transportation of coal from Illinois and Indiana mines to these destinations. The rates between the various origin groups in these fields have never been made with primary regard for distance, and to so make them now would have the effect eventually of eliminating practically all competition between most of them, a result which would be highly undesirable to the consumer, whose interests we may not disregard." [16]

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[16] The Commission made this additional observation concerning the weight it gave to distance, 263 I. C. C. at 204,

"And in according such weight to distance as seemed to us to be fair and reasonable, we have also kept in mind that the average distances of record, and as used in this report, especially from Illinois mines, frequently reflect seeming inconsistencies from the same group to destinations in close proximity to each other. For example, Amboy is located south of and about 12 miles over the Illinois Central and across country less distant from the Illinois groups than Dixon, but the average shortest tariff-route distance from the Springfield group is 9 miles greater and from the southern Illinois group 1 mile greater to the former than to the latter. By use of the short tariff routes the distance to Amboy is 9 miles greater from Springfield and 7 miles greater from southern Illinois than to Dixon. These variations in distance are due to the different routes used and also to the fact that frequently the group rate applies from a larger number of origins to one destination than to another. Thus, to Dixon the Springfield rate is published from 61 origins on 15 originating railroads, but to Amboy the rate applies from only 23 origins on 8 railroads. So also, the southern Illinois rate applies from 75 origins on 7 roads to Dixon and 65 origins on 5 roads to Amboy. The

There is no doubt, therefore, that the Commission believed that the competitive factor was an important one in considering this problem of rate relationships. The result may, as appellants contend, favor some Illinois mines over Indiana as respects certain markets. That would seem to follow, for example, from the elimination of the low single-line rate that the Commission found to be disruptive of rate relations between these groups. But it does not indicate that the rates approved by the Commission were unlawful. That might be established by showing, for example, that the Commission gave weight only to the competitive factor. Yet all that appellants attempt here is to show that discrepancies in rates are not warranted by any difference in transportation conditions or in distance. That is not enough provided the Commission was justified in considering the element of competition.

We think it was. Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well.[17] And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baf-

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variations in distance thus brought about are much greater from Illinois groups than from Indiana groups. It is plain, therefore, that comparisons based on distance, especially as between Indiana and Illinois groups to particular destinations, cannot be accepted as controlling, but must be evaluated with the above facts in mind."

[17] The consumer interest traditionally has been prominent in the Commission's consideration of the type of problem presented here. See *Andy's Ridge Coal Co.* v. *Southern R. Co.*, 18 I. C. C. 405, 410; *Waukesha Lime & Stone Co.* v. *Chicago, M., & St. P. R. Co., supra,* at 518, 519; *Wisconsin & Arkansas Lumber Co.* v. *St. Louis, I. M. & S. R. Co., supra,* at 37, 38; *Southwestern Interstate Coal Operators' Assn.* v. *Arkansas W. R. Co., supra,* at 85; *Coal to Illinois and Wisconsin, supra,* at 167, 169.

fied even experts. We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. See *Board of Trade* v. *United States,* 314 U. S. 534, 548; *New York* v. *United States,* 331 U. S. 284, 347–349.

Fourth. Appellants argue that the Commission acted beyond its authority because it did not afford the carriers alternative methods of removing the discrimination which was found to exist. See *Texas & Pacific R. Co.* v. *United States,* 289 U. S. 627. And Milwaukee argues that the Commission was without power to direct it to cease from granting the undue preference found to exist between its single-line rate and the higher joint-line rates, since it had no control over the latter.

This is not a case like *Texas & Pacific R. Co.* v. *United States, supra,* where the Commission issues a so-called alternative order directing the carriers to remove an unjust discrimination or undue preference which has been found. That kind of order leaves a choice to the carriers whether to eliminate the unlawful practice by raising one rate, lowering the other, or altering both. But as we recently held in *New York* v. *United States, supra,* at 342, that rule is not applicable where the Commission itself undertakes to correct the unlawful practice by pre-

scribing the just and reasonable rate. The Commission has taken that action here. As we noted above, the present proceeding was one under § 15 (1) and § 15 (7). Section 15 (1) gives the Commission power to determine and prescribe the just and reasonable rate once it finds, *inter alia,* that any rate charged is unjustly discriminating or unduly preferential or prejudicial. The Commission in the present case has exercised that power. It has prescribed approved rates. They are rates which in the Commission's judgment will eliminate the unjust discrimination and undue preference found to exist in this rate structure. Hence the question whether Milwaukee effectively controlled the higher joint-line rates is irrelevant here. *New York* v. *United States, supra.*

Finally it is suggested that the order is invalid because the Commission did not find that the preferential rates were noncompensatory. But once a forbidden discrimination or preference in rates is found, the Commission may remove it even though the rates are within the zone of reasonableness. *New York* v. *United States, supra,* at 344.

Affirmed.

HENSLEE, COLLECTOR OF INTERNAL REVENUE, *v.* UNION PLANTERS NATIONAL BANK & TRUST CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 90. Argued December 14, 1948.—Decided January 3, 1949.

Under a will the testator's entire estate was left in trust for his 85-year-old mother during her lifetime, after which certain specific bequests were made and the residue of the estate was to be divided equally among four named charities. The trustees were directed to pay the mother a stated monthly income, even if it should become necessary to invade the corpus of the trust, were further authorized to utilize any portion of the corpus for her "pleasure, comfort and welfare" and were admonished that the "first object to be accomplished" was to provide for her "in such manner as she may desire." She died three years later without invading the corpus of the trust. *Held:* Under § 812 (d) of the Internal Revenue Code, the charitable bequests were not deductible from the gross estate for estate tax purposes. *Merchants Bank* v. *Commissioner*, 320 U. S. 256. Pp. 595–600.

166 F. 2d 993, reversed.

A federal district court dismissed a suit for refund of federal estate taxes. 74 F. Supp. 113. The Court of Appeals reversed. 166 F. 2d 993. This Court granted certiorari. 335 U. S. 811. *Reversed*, p. 600.

Arnold Raum argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Harry Baum.*

Sam Polk Walker argued the cause for respondents. With him on the brief was *Roane Waring.*

PER CURIAM.

Respondents are the executors and trustees of the estate of William Bate Williams. They brought this

action for refund, with interest, of $35,899.12 of federal estate taxes and interest paid under protest. The relevant facts, set forth in respondents' complaint and admitted by the Collector's motion to dismiss, are as follows:

William Bate Williams died in 1943. Under the terms of his will, the entire gross estate of $508,411.17 was bequeathed to respondents to hold in trust for the testator's

> "beloved mother, Elizabeth Bate Williams, for and during her natural life, with the full power and authority herein conferred.
>
> "I hereby direct both my executors and my trustees to pay to my mother the sum of Seven Hundred Fifty (750.00) Dollars a month to be used by her as she sees fit. In the event the income from my estate is not sufficient to pay the said Seven Hundred Fifty ($750.00) Dollars each month, then my executors and trustees are hereby empowered, authorized and directed to encroach on the corpus of the estate to pay said amount and to sell any of my property, real or personal, for this purpose.
>
> "In addition to this amount my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother.
>
> "The first object to be accomplished in the administration and management of my estate and this trust is to take care of and provide for my mother in such manner as she may desire and my executors and trustees are fully authorized and likewise directed to manage my estate primarily for this purpose."

The will went on to provide for distribution of the corpus of the estate remaining at the mother's death. Twenty-five per cent of the total remaining estate was bequeathed to the testator's cousin, and stated sums in

cash were left to other named legatees. After these legacies, the balance of the estate was directed to be paid over to four named charities, in equal shares.

At the time of the testator's death the estate was earning a net income of approximately $15,000 per year, $6,000 more than the amount directed to be paid, at $750 per month, to the testator's mother. The mother at that time was eighty-five years old, lived on substantially less than $750 per month, and had independent investments worth approximately $100,000 which netted her an income of about $300 per month. A woman of moderate needs and without dependents, she died three years later without having requested respondents to invade the trust corpus in her behalf.

The disputed estate tax liability resulted from respondents' attempt to deduct from the gross estate the portion bequeathed to the four charities, in reliance on the charitable deduction provision of § 812 (d) of the Internal Revenue Code.[1] The Commissioner denied the deduction. The Collector here resists the refund claim, on the ground that the possibility of invasion of the corpus on behalf of the testator's mother prevented the ultimate charitable interest, at the testator's death, from being "presently ascertainable, and hence severable from the interest in favor of the private use," within the meaning of the applicable Treasury Regulation.[2]

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[1] 26 U. S. C. § 812 (d), 53 Stat. 124–125, as amended by Revenue Act of 1942, § 408 (a), 56 Stat. 949, and Revenue Act of 1943, § 511 (a), 58 Stat. 74–75.

[2] "If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. . . ." U. S. Treas. Reg. 105 § 81.44 (1942). Cf. *id.* at § 81.46: "If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject

On the authority of *Merchants Bank* v. *Commissioner*, 320 U. S. 256, the District Court granted the Collector's motion to dismiss. 74 F. Supp. 113. The Court of Appeals reversed. 166 F. 2d 993. It held that, notwithstanding the language of the testamentary provision for the "pleasure, comfort and welfare" of the mother, the complaint's allegations of the mother's great age, independent means and modest tastes raised a triable issue of fact as to whether the trust corpus was threatened with invasion and the charitable interest hence subject to depletion in favor of the testator's mother.

We agree with the District Court that this case is governed by the decision in the *Merchants Bank* case and that the suit should be dismissed. It is apparent on the face of the complaint that this testator's will did not limit the trustees' disbursements to conformity with some ready standard—as where, for example, trustees are to provide the prime beneficiary with such sums as "may be necessary to suitably maintain her in as much comfort as she now enjoys." *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 154. The stated income here directed to be paid to the mother was "to be used by her as she sees fit." Beyond this the trustees were empowered to invade or wholly utilize the corpus of the estate for the mother's "pleasure, comfort and welfare," bearing in mind the testator's injunction that "The first object to be accomplished . . . is to take care of and provide for my mother in such manner as she may desire . . . ." [3]

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to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

[3] In view of the express priority accorded the mother's wishes, respondents' fiduciary duty to the ultimate beneficiaries, private and charitable, was ineffective to guarantee preservation of any predictable fraction of the corpus for disposition after the mother's

As in the *Merchants Bank* case, where the trustees had discretion to disburse sums for the "comfort, support, maintenance, and/or happiness" of the prime beneficiary, so here we think it the "salient fact . . . that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction." 320 U. S. 256, 258, 262.

We do not overlook the unlikelihood that a woman of the mother's age and circumstances would abandon her customary frugality and squander her son's wealth. But, though there may have been little chance of that extravagance which would waste a part or consume the whole of the charitable interest, that chance remained. What common experience might regard as remote in the generality of cases may nonetheless be beyond the realm of precise prediction in the single instance. The contingency which would have diminished or destroyed the charitable interest here considered might well have been insured against, but such an arithmetic generalization of experience would not have made this charitable interest "presently ascertainable." [4] "Rough guesses, approxima-

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death. The testator, indeed, made the gifts to charity subordinate not only to his mother's interest but to that of all the private beneficiaries, stating in his will that the charitable interest "is a residuary bequest . . . and is not to infringe on any of the other legacies hereinbefore provided."

[4] ". . . [T]he fundamental question in the case at bar, is not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given to a statute. Did Congress in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency, the actual value of which cannot be determined from any known data? Neither taxpayer, nor revenue officer—even if equipped with all the aid which the actuarial art can supply—could do more than guess at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character." *Humes* v. *United States,* 276 U. S. 487, 494.

tions, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient." *Merchants Bank* v. *Commissioner, supra* at 261.

Nor do we think it significant that the trust corpus was intact at the mother's death, for the test of present ascertainability of the ultimate charitable interest is applied "at the death of the testator." *Ibid.* The charitable deduction is a matter of congressional grace, and it is for Congress to determine the advisability of permitting amendment of estate tax returns at such time as the probable vesting of the charitable interest has reduced itself to unalterable fact.

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON dissent upon the grounds stated in dissent in *Merchants Bank* v. *Commissioner,* 320 U. S. 256, at 263.

MR. JUSTICE FRANKFURTER, dissenting.

Wisdom too often never comes, and so one ought not to reject it merely because it comes late. Since I now realize that I should have joined the dissenters in the *Merchants Bank* case, 320 U. S. 256, I shall not compound error by pushing that decision still farther. I would affirm the judgment, substantially for the reasons given below. 166 F. 2d 993.

KLAPPROTT *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 42. Argued October 20, 1948.—Decided January 17, 1949.

Nine years after petitioner had been admitted to citizenship and granted a certificate of naturalization, the United States filed a complaint in a federal district court in New Jersey, under 8 U. S. C. § 738, to set aside the order and cancel the certificate. It alleged that his oath of allegiance was false; that subsequently by writings and speeches he had evidenced his loyalty to Germany and disloyalty to the United States; and that he was a leader and a member of the German American Bund and other subversive organizations. He was served with notice, but failed to answer within sixty days as required by 8 U. S. C. § 738 (b). (Seven days before expiration of the sixty days, he was arrested on federal criminal charges and confined in a New York jail.) Without hearings or evidence, the court entered a default judgment setting aside the order admitting him to citizenship and canceling his certificate of naturalization. More than four years later and while still a federal prisoner, he filed in the same court a verified petition praying that the default judgment be set aside. *Inter alia,* he alleged in substance that, while wrongfully holding him in New York, Michigan, and District of Columbia jails, the Government caused a district court in New Jersey to revoke his citizenship on the ground that he had failed to appear and defend, although he was at the time without funds to hire a lawyer. These allegations were undenied. The district court dismissed the petition on the ground of laches. The Court of Appeals affirmed. *Held:* The judgments are reversed and the cause is remanded to the district court with instructions to set aside the default judgment and grant petitioner a hearing on the merits of the issues raised by the denaturalization complaint. Pp. 602–608, 615–616. [This judgment modified, 336 U. S. 942.]
166 F. 2d 273, reversed.

A federal district court entered a default judgment setting aside an order admitting petitioner to citizenship and canceling his certificate of naturalization. More than four years later, he petitioned the same court to set aside the default judgment, but his petition was dismissed on the ground of laches. 6 F. R. D. 450. The Court of

Appeals affirmed. 166 F. 2d 273. This Court granted certiorari. 334 U. S. 818. *Reversed,* pp. 615–616.

P. Bateman Ennis argued the cause for petitioner. With him on the brief were *W. Clifton Stone* and *Morton Singer.*

Robert L. Stern argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg.*

MR. JUSTICE BLACK announced the judgment of the Court and delivered the following opinion in which MR. JUSTICE DOUGLAS joins.

This case raises questions concerning the power of federal district courts to enter default judgments depriving naturalized persons of their citizenship without hearings or evidence, and to set aside default judgments under some circumstances four years or more after the default judgments were entered.

The petitioner was born in Germany. In 1933 after a hearing a New Jersey state court entered a judgment admitting him to United States citizenship. Petitioner then took an oath renouncing allegiance to Germany and promising to bear true faith and allegiance to the United States, whereupon the court granted him a certificate of naturalization. See 8 U. S. C. § 735.

Nine years later the United States Attorney, acting pursuant to 8 U. S. C. § 738, filed a complaint in the United States District Court of New Jersey to set aside the state court's judgment and cancel petitioner's certificate of naturalization. The complaint alleged generally that petitioner's oath of allegiance, etc., was false, that at the time of taking it petitioner well knew that he was not attached to the principles of the United States Constitution, and that he had not in fact intended thereafter to bear true allegiance to the United States or renounce and discontinue his allegiance and fidelity to Ger-

many. In particular the complaint charged no more than that petitioner subsequent to 1935 had evidenced his loyalty to Germany and his disloyalty to this country by writings and speeches; that he was in 1942 and had been before that time a leader and member of the German American Bund and other organizations, the principles of which were alleged to be inimical to the Constitution of the United States and the happiness of its people; that these organizations were propagated and encouraged by enemies of the United States who believed in the ideology enunciated by Adolph Hitler. For the requirement that allegations of fraud be particularized, see Rule 9 (b) of the Rules of Civil Procedure.

Petitioner, though served with notice May 15, 1942, failed to answer the complaint within sixty days as required by 8 U. S. C. § 738 (b). But on July 7, 1942, before expiration of the sixty days, petitioner was arrested and confined in a New York jail on criminal charges brought by the United States. On July 17, 1942, the Federal District Court of New Jersey on motion of the United States Attorney, entered a judgment by default against petitioner in the denaturalization proceedings, set aside the 1933 state court judgment admitting him to citizenship, and cancelled his certificate of naturalization.

More than four years after the default judgment was rendered against him, and while petitioner was still a government prisoner, he filed in the District Court a verified petition praying that the court set aside the judgment. The United States did not deny any of the facts alleged in the verified petition. The District Court, necessarily accepting the undenied allegations as true, held that the petitioner had been guilty of "willful and inexcusable neglect" and accordingly dismissed the petition "because of the defendant's laches." 6 F. R. D. 450. The United States Court of Appeals, rejecting petitioner's several contentions, affirmed, one judge dissenting. 166 F. 2d 273.

In considering the case we also must accept as true the undenied allegations of the petitioner. These facts are of great importance in considering some of the legal contentions raised. The alleged facts chronologically arranged are as follows:

1933

Nov. 16. Petitioner was naturalized by order of court.

1936

Nov. 17. Petitioner married an American citizen and now has one child by that marriage.

1942

Spring. Petitioner was seriously ill. The illness left him financially poor and so weakened that he was unable to work.

May 12. United States Attorney filed the complaint in the United States District Court of New Jersey to cancel petitioner's citizenship.

May 15. Complaint served on petitioner. He had no money to hire a lawyer. He drew a draft of an answer to the complaint and wrote a letter to the American Civil Liberties Union asking that they represent him without fee.

July 7. Arrested under federal indictment charging petitioner and others with conspiracy to violate the Selective Service Act. Taken before United States Commissioner at Newark, New Jersey; later carried to New York by Federal Bureau of Investigation agents, there put in prison, unable to make bond of $25,000 under which he

was held. His letter to Civil Liberties Union taken from him by agents of the FBI eight days before expiration of time to answer cancellation of citizenship charge in New Jersey. The agents retained the letter, never mailing it.

1942

July 17. Judgment by default entered by New Jersey court in citizenship cancellation case. At the time, petitioner was in a New York jail awaiting trial under the selective service conspiracy case. No evidence was offered by the Government to prove its charges in the complaint for cancellation of citizenship. The Government's case consisted of no more than a verification of this complaint by an FBI agent on information and belief, based on the agent's having read FBI files concerning petitioner.

July 7, 1942, date of arrest, to June 1943. While petitioner was still in jail, a lawyer was appointed by the New York District Court to defend petitioner in the selective service criminal case. At his request the New York lawyer promised to help him also in the New Jersey cancellation proceedings, but the lawyer neglected to do so. Petitioner was convicted and sentenced to penitentiary.

1943

June. Petitioner elected to begin service of the New York sentence pending appeal, was carried to and confined in federal institution in Michigan where he remained until January 30, 1944.

1944

Jan. 30. Petitioner transferred from federal prison in Michigan to jail in the District of Columbia to be tried with twenty-nine other persons on a charge of sedition.

1945

June 11. This Court reversed petitioner's New York conviction, *Keegan* v. *United States,* 325 U. S. 478, but he continued to be held in the District of Columbia jail until November 22, 1946.

1946

Nov. 22. District of Columbia sedition case dismissed. *United States* v. *McWilliams et al.,* 82 U. S. App. D. C. 259, 163 F. 2d 695. The case had previously been tried for eight months, but before completion a mistrial was declared because of the death of the presiding judge. Shortly after dismissal of the sedition case petitioner, still a prisoner of the United States, was carried to Ellis Island for deportation on account of the cancellation of his citizenship under the New Jersey default judgment.

Dec. 9. This Court denied certiorari in three court actions unsuccessfully prosecuted by the Citizens Protective League on behalf of 159 individuals including petitioner. (The League was a non-profit organization "to insure equal rights for all and to safeguard the constitutional rights of all persons." *Citizens Protective League* v. *Clark,* 81 U. S. App. D. C. 116, 117, 155 F. 2d 290, 291; *cert. denied,* 329 U. S. 787. The complaint prayed that the At-

torney General be enjoined from deporting the 159 individuals. Petitioner had been ordered deported March 27, 1946, while he was in the District of Columbia jail charged with sedition.)

1946

Dec. 12. Three days after this Court's denial of certiorari, in the action brought by the Citizens Protective League, petitioner, still a government prisoner at Ellis Island, stated the substance of the foregoing facts under oath and a petition was filed on his behalf in the New Jersey District Court to vacate the default judgment and grant him a trial on the merits. Petitioner's verified motion also alleged that the Government's charges against him in the New Jersey court were untrue and he strongly asserted his loyalty to the United States.

1947

Feb. 7. District judge dismissed the petitioner's motion holding that petitioner had been guilty of laches in not arranging while in prison for defense of the cancellation of citizenship charge.

Thus, this petitioner has now been held continuously in prison by the Government for six and one-half years. During that period he served one and one-half years of a penitentiary punishment under a conviction which this Court held was improper. He was also held in the District of Columbia jail two years and ten months under an indictment that was later dismissed. It is clear therefore, that for four and one-half years this petitioner was held in prison on charges that the Government was unable to sustain. No other conclusion can be drawn except that

this long imprisonment was wrongful. Whether the judgment by default should be set aside must therefore be decided on the undenied allegations that the Government, largely through the action of FBI agents, wrongfully held petitioner in New York, Michigan, and District of Columbia prisons, while the same Government, largely acting through the same or other FBI agents, caused a district court to revoke petitioner's citizenship on the ground that petitioner had failed to make appearance and defend in the New Jersey courts, although petitioner was at the time without funds to hire a lawyer.

First. Amended Rule 60 (b) of the Federal Rules of Civil Procedure became effective March 19, 1948.[1] That

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[1] Amended Rule 60 (b) provides:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

was after the District Court denied the motion to set aside this default judgment and after affirmance of the District Court's action by the Court of Appeals. For these reasons the Government contends that amended Rule 60 (b) should not be applied here. In some respects, the amended rule grants courts a broader power to set aside judgments than did the old rule. Petitioner should be afforded the benefit of the more liberal amended 60 (b). For Rule 86 (b) made amended 60 (b) applicable to "further proceedings in actions then pending" unless it "would work injustice" so to apply the rule. It seems inconceivable that one could think it would work any injustice to the Government to measure the petitioner's rights by this amended rule in this case where all he asks is a chance to try the denaturalization proceeding on its merits. Amended Rule 60 (b) should be applied.

Second. Amended Rule 60 (b) authorizes a court to set aside "a void judgment" without regard to the limitation of a year applicable to motions to set aside on some other grounds. It is contended that this judgment is void because rendered by a District Court without hearing any evidence. The judgment is void if the hearing of evidence is a legal prerequisite to rendition of a valid default judgment in denaturalization proceedings. While 8 U. S. C. § 738, under which this denaturalization complaint was filed, plainly authorizes courts to revoke the citizenship of naturalized citizens after notice and hearing, it contains no explicit authorization for rendition of default judgments. Congressional intention to authorize court action in the absence of a citizen might be implied, however, from the provision for notice by publication in § 738 (b). Aside from possible constitutional questions, it may therefore be assumed that the section authorizes rendition of a denaturalization judgment in a defendant's absence. But it does not necessarily fol-

low that a court may also render judgment without proof of the charges made in a denaturalization complaint. And there is strong indication in § 738 and companion sections that Congress did not intend to authorize courts automatically to deprive people of their citizenship for failure to appear.

8 U. S. C. § 746 makes it a felony for applicants for naturalization or others to violate federal laws relating to naturalization. Had petitioner been found guilty of making the false oath here charged, he could have been convicted of and punished for a felony under this section. But he could have been convicted only after indictment and a jury trial at which he would have been present and represented by counsel. A conviction would have required a proof of guilt beyond a reasonable doubt, on testimony of witnesses given in the presence of the accused who would have had an opportunity to cross-examine the witnesses against him. In the event of such a conviction under required procedural safeguards, § 738 (e) authorizes courts to revoke citizenship and cancel naturalization certificates. There is a broad gap between a § 738 denaturalization thus accomplished and the one ordered by the court in this proceeding. For here, the defendant was absent, no counsel or other representative of his was present, no evidence was offered, and the only basis for action was a complaint containing allegations, questionable from a procedural and substantive standpoint, verified by an FBI agent on information acquired by him from looking at hearsay statements in an FBI dossier. The protection Congress afforded in § 738 (e) emphasizes the unfairness that would result from permitting denaturalizations in other § 738 proceedings without any evidence at all.

When we look to federal statutes other than § 738 we find no command and no express authority for courts to

enter denaturalization judgments by default without proof of facts to support the judgment. No such authority or command is contained in Rule 55 of the Federal Rules of Civil Procedure which rule relates to default judgments. Rule 55 (e) expressly bars all judgments against the United States without proof, but it cannot be inferred from this that proof is never required as a prerequisite to default judgments against all defendants other than the United States. For Rule 55 (b) (2) expressly provides for representation of defaulting parties in some instances. Rule 55 (b) (2) also directs that in certain specified instances courts, before entering judgments after default of appearance, shall make investigations, conduct hearings, and even grant jury trials. In addition to these particularized instances, Rule 55 (b) (2) also provides for court hearings before default judgment where "it is necessary . . . to establish the truth of any averment by evidence or to make an investigation of any other matter."

Thus it appears that statutes and rules have largely left for judicial determination the type of cases in which hearings and proof should precede default judgments. In this situation it is the final responsibility of this Court to formulate the controlling rules for hearings and proof. See *McNabb* v. *United States,* 318 U. S. 332, 341. For the following reasons it seems peculiarly appropriate that a person's citizenship should be revoked only after evidence has established that the person has been guilty of prohibited conduct justifying revocation.

Denaturalization consequences may be more grave than consequences that flow from conviction for crimes. Persons charged with crime in United States courts cannot be convicted on default judgments unsupported by proof. Even decrees of divorce or default judgments for money damages where there is any uncertainty as to the amount

must ordinarily be supported by actual proof. The reasons for requirement of proof in cases involving money apply with much greater force to cases which involve forfeiture of citizenship and subsequent deportation. This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. 8 U. S. C. § 719. As a result of the denaturalization here, petitioner has been ordered deported. "To deport one who so claims to be a citizen, obviously deprives him of liberty . . . . It may result also in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho* v. *White,* 259 U. S. 276, 284. Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment.

Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. *Schneiderman* v. *United States,* 320 U. S. 118, 158. This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt. The same factors that caused us to require proof of this nature as a prerequisite to denaturalization judgments in hearings with the defendant present, apply at least with equal force to proceedings in which a citizen is stripped of his citizenship rights in his absence. Assuming that no additional procedural safeguards are required, it is our opinion that courts should not in § 738 proceedings deprive a person of his citizenship until the Government first offers proof of its charges sufficient to satisfy the

burden imposed on it, even in cases where the defendant has made default in appearance.

Third. But even if this judgment of denaturalization is not treated as void, there remain other compelling reasons under amended 60 (b) for relieving the petitioner of its effect. Amended 60 (b) provides for setting aside a judgment for any one of five specified reasons or for "any other reason justifying relief from the operation of the judgment." The first of the five specified reasons is "mistake, inadvertence, surprise, or excusable neglect." To take advantage of this reason the Rule requires a litigant to ask relief "not more than one year after the judgment, order, or proceeding was entered or taken." It is contended that the one-year limitation bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but "excusable neglect." And of course, the one-year limitation would control if no more than "neglect" was disclosed by the petition. In that event the petitioner could not avail himself of the broad "any other reason" clause of 60 (b). But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere "neglect" on his part. The undenied facts set out in the petition reveal far more than a failure to defend the denaturalization charges due to inadvertence, indifference, or careless disregard of consequences. For before, at the time, and after the default judgment was entered, petitioner was held in jail in New York, Michigan, and the District of Columbia by the United States, his adversary in the denaturalization proceedings. Without funds to hire a lawyer, petitioner was defended by appointed counsel in the criminal cases. Thus petitioner's prayer to set aside the default judgment did not rest on mere allegations of "excusable neglect." The foregoing allegations and others in the petition tend to support petitioner's argument that he was deprived of any reasonable opportunity to

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make a defense to the criminal charges instigated by officers of the very United States agency which supplied the secondhand information upon which his citizenship was taken away from him in his absence. The basis of his petition was not that he had neglected to act in his own defense, but that in jail as he was, weakened from illness, without a lawyer in the denaturalization proceedings or funds to hire one, disturbed and fully occupied in efforts to protect himself against the gravest criminal charges, he was no more able to defend himself in the New Jersey court than he would have been had he never received notice of the charges. Under such circumstances petitioner's prayer for setting aside the default judgment should not be considered only under the excusable neglect, but also under the "other reason" clause of 60 (b), to which the one-year limitation provision does not apply.

Fourth. Thus we come to the question whether petitioner's undenied allegations show facts "justifying relief from the operation of the judgment." It is contended that the "other reason" clause should be interpreted so as to deny relief except under circumstances sufficient to have authorized relief under the common law writs of *coram nobis* and *audita querela,* and that the facts shown here would not have justified relief under these common law proceedings. One thing wrong with this contention is that few courts ever have agreed as to what circumstances would justify relief under these old remedies. To accept this contention would therefore introduce needless confusion in the administration of 60 (b) and would also circumscribe it within needless and uncertain boundaries. Furthermore 60 (b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the "other reason" clause, for all reasons except the five particularly

specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

Fifth. The undenied allegations already set out show that a citizen was stripped of his citizenship by his Government, without evidence, a hearing, or the benefit of counsel, at a time when his Government was then holding the citizen in jail with no reasonable opportunity for him effectively to defend his right to citizenship. Furthermore, the complaint in the denaturalization proceeding strongly indicates that the Government here is proceeding on inadequate facts, just as it did in the criminal cases it brought against petitioner. For if the Government had been able on a trial to prove no more than the particular facts it alleged in its denaturalization complaint, it is doubtful if its proof could have been held sufficient to revoke petitioner's citizenship under our holdings in *Baumgartner* v. *United States,* 322 U. S. 665, *Schneiderman* v. *United States,* 320 U. S. 118, *Knauer* v. *United States,* 328 U. S. 654, 659, and see Rule 9 (b) of the Rules of Civil Procedure. And all petitioner has asked is that the default judgment be set aside so that for the first time he may defend on the merits. Certainly the undenied facts alleged justify setting aside the default judgment for that purpose. Petitioner is entitled to a fair trial. He has not had it. The Government makes no claim that he has. Fair hearings are in accord with elemental concepts of justice, and the language of the "other reason" clause of 60 (b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, MR. JUSTICE RUTLEDGE and MR. JUSTICE BURTON agree that the District Court erred in dismissing the petition to set aside the default judgment, and that

the Court of Appeals erred in affirming the District Court judgment. The judgments accordingly are reversed and the cause is remanded to the District Court with instructions to set aside the judgment by default and grant the petitioner a hearing on the merits of the issues raised by the denaturalization complaint.*

It is so ordered.

MR. JUSTICE BURTON, while agreeing with MR. JUSTICE REED that a judgment of denaturalization may be entered by default without a further showing than was made in this case, believes that, under the special circumstances here shown on behalf of this petitioner, the judgment by default should be set aside and the petitioner should be granted a hearing on the merits of the issues raised by the denaturalization complaint. He therefore joins in the judgment of the Court as limited to the special facts of this case and without expressing an opinion upon any issues not now before this Court.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE MURPHY agrees, concurring in the result.

To treat a denaturalization proceeding, whether procedurally or otherwise, as if it were nothing more than a suit for damages for breach of contract or one to recover overtime pay ignores, in my view, every consideration of justice and of reality concerning the substance of the suit and what is at stake.

To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others.[1] To lay upon the citizen the punishment of exile

*[This judgment modified, 336 U. S. 942.]

[1] Cf. *Ng Fung Ho* v. *White*, 259 U. S. 276, 284; *Schneiderman* v. *United States*, 320 U. S. 118, 122, and concurring opinion 165; *Knauer* v. *United States*, 328 U. S. 654, dissenting opinion 675.

for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power. U. S. Const., Amend. VIII. Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.

No such procedures could strip a natural-born citizen of his birthright or lay him open to such a penalty. I have stated heretofore the reasons why I think the Constitution does not countenance either that deprivation or the ensuing liability to such a punishment for naturalized citizens. *Schneiderman* v. *United States,* 320 U. S. 118, concurring opinion 165; *Knauer* v. *United States,* 328 U. S. 654, dissenting opinion 675.

Those views of the substantive rights of naturalized citizens have not prevailed here. But the *Schneiderman* decision and *Baumgartner* v. *United States,* 322 U. S. 665, required a burden of proof for denaturalization which in effect approximates the burden demanded for conviction in criminal cases, namely, proof beyond a reasonable doubt of the charges alleged as cause for denaturalization.[2] This was in itself and to that extent recognition that ordinary civil procedures, such as apply in suits upon contracts and to enforce other purely civil liabilities, do not suffice for denaturalization and all its consequences.

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[2] See *Schneiderman* v. *United States,* 320 U. S. 118, 125, 136, 153, 154, 158, 159. At page 158 we said: "We conclude that the Government has not carried its burden of proving by 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt,' that petitioner obtained his citizenship illegally." The concurring opinion in *Knauer* v. *United States,* 328 U. S. 654, 674, went upon the basis of satisfaction "beyond all reasonable doubt" concerning the proof of the grounds asserted for denaturalization.

More than this it was not necessary to decide in the cases cited. No less should be required, in view of the substantial kinship of the proceedings with criminal causes, whatever their technical form or label. Cf. *Knauer* v. *United States,* 328 U. S. 654, dissenting opinion 675, 678.

This case, however, presents squarely the issue whether, beyond any question of burden or weight of proof, the ordinary civil procedures can suffice to take away the naturalized citizen's status and lay him open to permanent exile with all the fateful consequences following for himself and his family, often as in this case native-born Americans. The question in its narrower aspect is indeed whether those consequences can be inflicted without any proof whatever.

Under our system petitioner could not be convicted or fined for mail fraud, overceiling sales, or unlawfully possessing gasoline ration coupons upon a judgment taken by default, much less under the circumstances this record discloses to have been responsible for the default. Yet his basic right to all the protections afforded him as a citizen by the Constitution can be stripped from him, so it is now urged, without an iota of proof, without his appearance or presence in court, without counsel employed or assigned to defend that right, and indeed with no real opportunity on his part to prepare and make such a defense. The case thus goes far beyond the Court's ruling in *Knauer* v. *United States, supra.* And, in my opinion, it brings to clearer focus whether, beyond the matter of satisfying the burden of proof required by the *Schneiderman* and *Baumgartner* cases, the *Knauer* case rightly permitted denaturalization through the civil procedures there pursued.[3]

[3] In the view of those dissenting, as well as that of the majority in the *Knauer* case, the Government had satisfied fully the burden of proof required by the *Schneiderman* and *Baumgartner* decisions. See 328 U. S. 654, 675.

If, in deference to the Court's rulings, we are to continue to have two classes of citizens in this country, one secure in their status and the other subject at every moment to its loss by proceedings not applicable to the other class, cf. *Schneiderman* v. *United States, supra,* concurring opinion at 167; *Knauer* v. *United States, supra,* dissenting opinion at 678, I cannot assent to the idea that the ordinary rules of procedure in civil causes afford any standard sufficient to safeguard the status given to naturalized citizens. If citizenship is to be defeasible for naturalized citizens, other than by voluntary renunciation or other causes applicable to native-born citizens,[4] the defeasance it seems to me should be surrounded by no lesser protections than those securing all citizens against conviction for crime. Regardless of the name given it, the denaturalization proceeding when it is successful has all the consequences and effects of a penal or criminal conviction, except that the ensuing liability to deportation is a greater penalty than is generally inflicted for crime.

Regarding the proceeding in this light, I do not assent in principle that the judgment of denaturalization can be taken by default or that the rules of civil procedure applicable in ordinary civil causes apply to permit such a result.

The grounds which I have stated for these conclusions logically would lead to casting my vote to reverse the judgment with instructions to dismiss the proceedings. Since, however, that disposition does not receive the concurrence of a majority, I join with those who, on other grounds, think that the judgment should be reversed and remanded for a new trial, in voting so to dispose of the cause. Accordingly I concur in the Court's judgment. I may add that, upon the assumption that rules of civil

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[4] See *Knauer* v. *United States,* 328 U. S. 654, dissenting opinion 675, 676.

procedure may apply in denaturalization proceedings, I am substantially in accord with the views expressed by MR. JUSTICE BLACK.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE and MR. JUSTICE JACKSON join, dissenting.

In May, 1942, the United States began proceedings in the United States District Court for the District of New Jersey, against Klapprott under § 338 of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U. S. C. § 738,[1] to cancel his certificate of naturalization, issued in 1933, on the ground that he had taken a false oath of allegiance to procure the certificate. The complaint alleged that at the time he took the oath petitioner knew that he was not attached to the principles of the Constitution of the United States and did not intend to renounce his allegiance to the German Reich; that petitioner "is and has been notoriously and openly one of the chief leaders and active members of the German-American Bund" and other organizations sympathetic to the German Reich;

[1] "(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

"(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

and that he had made "numerous statements indicating his allegiance and loyalty to the German Reich and his disregard and disrespect for the principles and institutions of the United States of America."

Petitioner was personally served with summons on May 15, 1942. Without the introduction of any evidence, judgment by default was entered against him on July 17, 1942, when he failed to answer within the sixty days allowed by § 338, *supra,* note 1.

In January, 1947, four and one-half years later, Klapprott petitioned the same district court which had entered the judgment of denaturalization for an order to show cause why that judgment should not be vacated. In an affidavit appended to his petition, he stated, after admitting receipt of the summons and complaint, that it was impossible for him to enter a defense and intimated that he was unable to take steps to have the judgment vacated prior to 1947. There is no allegation that he was ignorant of the entry of the judgment for any period of time. See Rules 5 (a) and 77 (d) of the Federal Rules of Civil Procedure. The reasons contained in the affidavit in support of this general statement can be summarized as follows: Petitioner, as a result of serious illness, was in poor health and "unable to get around very well" at the time summons was served. Since he had no money with which to retain a lawyer, he drafted a letter to the American Civil Liberties Union of New York requesting legal assistance. On July 7, 1942, seven days before time for filing appearance expired, he was arrested by federal authorities on an indictment in the United States District Court for the Southern District of New York, charging him with a conspiracy to violate the Selective Service Act. The letter was taken by these authorities, and, so far as Klapprott knew, never mailed. The court appointed a lawyer to defend petitioner in the New York conspiracy case. Petitioner informed him of the denatu-

ralization proceeding, to which the lawyer promised to attend, but which he neglected, allowing judgment to be entered by default. Because of the lengthy trial and exceedingly high bail in connection with the conspiracy charge, petitioner was still unable to take steps to have the judgment vacated. He was found guilty of the conspiracy [2] and committed to the Federal Correctional Institution at Milan, Michigan. On January 30, 1944, pursuant to another indictment—the "Sedition Case" [3] in the United States District Court for the District of Columbia—he was transferred to the District of Columbia. He remained in custody throughout the trial of this case until November 21, 1946, when the indictment was dismissed. Petitioner was then released but was immediately remanded to custody at Ellis Island for the purpose of deportation. From there he began this attempt to have the judgment of denaturalization vacated.

Petitioner in his affidavit denied the allegations in the government's original complaint and asserted that he had a good and legal defense to the action for cancellation of his certificate of naturalization.

If petitioner is entitled to relief from the default judgment, he must qualify under one or more of the provisions of Rule 60 (b) of the Federal Rules of Civil Procedure.[4] I do not think that his petition or the affidavit

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[2] Conviction subsequently reversed in *Keegan* v. *United States*, 325 U. S. 478.

[3] *United States* v. *McWilliams*, 82 U. S. App. D. C. 259, 163 F. 2d 695.

[4] Rule 60 (b):

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct

in support thereof meets the requirements of that Rule for vacating a judgment.

First. The Court assumes, as I think it must, that § 338 of the Nationality Act authorizes default judgments of denaturalization. So much is clear from the provisions in (b) of that section for notice by publication and in (c) for the denaturalization of one who has left the United States to establish a permanent residence elsewhere. The action authorized by the section is civil.[5] The general rule in civil actions is that notice places on the party to whom it is directed the responsibility to appear and defend or face the consequences. Rule 55 of the Federal Rules of Civil Procedure provides for default judgments

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of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

[5] A subsequent section, 54 Stat. 1163, 8 U. S. C. § 746 (a) (1) and (d), specifically providing for the criminal penalties of fine and imprisonment for the utterance of a false oath such as this, indicates an intention that proceedings under § 338 are not criminal.

Cf. *Knauer* v. *United States,* 328 U. S. 654, 671; *Luria* v. *United States,* 231 U. S. 9, 27–28; *Sourino* v. *United States,* 86 F. 2d 309; *United States* v. *Wezel,* 49 F. Supp. 16, 17.

in civil actions where the party against whom relief is sought fails to plead. The instances enumerated in (b) (2) and (e) of that rule, as those where a default judgment shall not be entered, do not include this case.

The Court suggests under caption *Second,* however, that the presentation of evidence is a prerequisite to the entry of such a judgment, and that a default judgment entered without evidence is void and therefore subject to vacation without a definite time limit under (4) of Rule 60 (b). It points out that *Schneiderman* v. *United States,* 320 U. S. 118, held that "clear and convincing" evidence is necessary to support a judgment of denaturalization. The holding in that case, however, must be viewed in its setting, *i. e.,* a contested case. The case does not support the proposition that any evidence, clear and convincing or otherwise, is required in an uncontested denaturalization proceeding. The general rule in civil actions is that none is necessary. Even though deportation is a most serious disaster to the deportee, it is founded here on uncontested allegations of adequate facts that must be taken as true. Although the committee which formulated the Federal Rules of Civil Procedure twice made a hearing on evidence a requirement for the entry of a default judgment, Rule 55 (b) (2) and (e), no such requirement was expressed for cases of this sort. Except for cases of the sort specified in (b) (2) and (e), and those where the amount of damages is in question, I think the meaning of the Rule is that a default is the equivalent of an admission of allegations which are well pleaded.

The Court seeks support in the fact that other sections of the Nationality Act, 8 U. S. C. §§ 738 (e) and 746, provide for denaturalization when the alien has been convicted of the crime of procuring his certificate of naturalization by knowingly false statements under oath. The protections which safeguard the alien in such a

criminal prosecution are sought to be extended to him in civil proceedings under § 738. To me the very existence in the Act of two parallel methods of denaturalization indicate that the protections inherent in the criminal proceeding are not intended to apply to the civil proceeding such as we have here.

Since no expression of Congress can be found, either in the Federal Rules or in the Nationality Act, to the effect that evidence is necessary to validate a civil default judgment of denaturalization, I do not think it is the function of this Court to supply one.

The suggestion of the Court in caption *Fifth* that the government's complaint does not state a cause of action, seems unwarranted. Certainly the government is not required to plead all its evidence. Since the complaint alleged fraud and specified in paragraph 6 thereof the circumstances constituting fraud, set out in the first paragraph of this dissent, I think *Knauer* v. *United States,* 328 U. S. 654, belies the suggestion that the complaint is defective.

Thus I dissent from the suggestion that the judgment against Klapprott can be vacated as void under Rule 60 (b) (4).

Second. The Court holds that petitioner is entitled to relief under (6), the "other reason" clause of Rule 60 (b). This follows, it is said, from his allegations that he was held in custody and subjected to several criminal prosecutions by the United States. As I see it, such allegations add nothing to the single ground on which relief could have been based, *i. e.,* "mistake, inadvertence, surprise, or excusable neglect." Rule 60 (b) (1). I do not mean to say that an arrest and a subsequent period of imprisonment which interfered to the extent of depriving him of the opportunity to get legal assistance or the ability to litigate would not entitle him to relief. In view of the facts set out in petitioner's own affidavit,

however, it is difficult to see how imprisonment subjected him to any injustice in this case or how it furnishes him with an additional ground for relief. Thus petitioner does not allege that he requested the return to him or the mailing of his letter to the American Civil Liberties Union. He does not, in fact could not, claim that imprisonment deprived him of the right to counsel. On the contrary he admits that counsel was made available in time to enter an appearance in the denaturalization proceeding, but that counsel negligently failed to do so. Petitioner's ability to litigate during this period of purportedly drastic confinement is illustrated by the fact that in 1945, as stated in his affidavit, he began and continued until its unsuccessful termination a suit to enjoin the Department of Justice from deporting him.

Since the facts alleged amount to a showing of mistake, inadvertence, or excusable neglect only, and since a definite time limit of one year is imposed on relief based on these grounds, the Rule cannot be said to contemplate a remedy without time limit based on the same facts. Otherwise the word "other" in clause (6) is rendered meaningless.[6]

The Court intimates that petitioner was woefully mistreated by the government. If by this it is meant that he is entitled to relief from judgment based on "misconduct of an adverse party," Rule 60 (b) (3), the answer is that relief on this ground is limited to one year from the judgment. On analysis, however, the suggestion that petitioner's trials have been carried on in a way contrary to concepts of justice as understood in the United States and in a manner incompatible with the pattern of American justice falls flat in view of the simple facts. Klapprott had counsel and open hearings. The courts have cleared him of complicity in a conspiracy to impede the

[6] Cf. *Wallace* v. *United States*, 142 F. 2d 240, 244.

raising of an army and have dismissed a prosecution for seditious conspiracy. To be cleared on these charges can have no effect upon the propriety of his deportation for violation of our naturalization laws.

The limitations imposed by Rule 60 (b) are expressions of the policy of finally concluding litigation within a reasonable time. Such termination of lawsuits is essential to the efficient administration of justice. I would not frustrate the policy by allowing litigants to upset judgments of long standing on allegations such as Klapprott's.

MR. JUSTICE FRANKFURTER, dissenting.

American citizenship other than when acquired by birth rests on a judicial judgment of naturalization. *Tutun* v. *United States,* 270 U. S. 568. Congress has explicitly defined the procedures for annulling such a judgment. *Johannessen* v. *United States,* 225 U. S. 227; *Luria* v. *United States,* 231 U. S. 9; § 15 of the Act of June 29, 1906, 34 Stat. 596, 601, now formulated in 54 Stat. 1158, 8 U. S. C. § 738. Neither in its terms nor on a fair interpretation of our naturalization laws has Congress indicated that such a judgment—the certificate of naturalization—cannot be annulled by default, that is, without active contest against such annulment, provided that ample opportunity has in fact been afforded to a citizen to contest. This Court is not justified in adding a requirement to the cancellation proceedings that Congress has seen fit to withhold unless some provision of the Constitution so demands. The only possible provision on which an argument can be based that citizenship cannot be canceled by a default judgment is the Due Process Clause of the Fifth Amendment. I reject the suggestion that it offends due process for a judgment of naturalization obtained by fraud to be set aside if the defrauding alien is afforded ample opportunity to contest the Gov-

ernment's claim that he obtained his citizenship through fraud and chooses not to avail himself of that opportunity but allows a judgment of cancellation to go by default.

But in rejecting the contention that citizenship cannot be lost by a default judgment, one does not necessarily embrace the other extreme of assimilating a naturalization judgment to any other civil judgment. This Court has held that because a naturalization judgment involves interests of a different order from those involved in other civil proceedings, the annulment of such a judgment is guided by considerations qualitatively different from those that govern annulment of ordinary judgments. *Schneiderman* v. *United States,* 320 U. S. 118; *Baumgartner* v. *United States,* 322 U. S. 665. The considerations that set a contested proceeding for cancelling a naturalization judgment apart from other suits to annul a judgment, are equally relevant to a default judgment causing such cancellation. To be sure, the public interest in putting a fair end to litigation and in not allowing people to sleep on their rights has its rightful claim even in proceedings resulting in deprivation of citizenship. But because citizenship has such ramifying significance in the fate of an individual and of those dependent upon him, the public interest to be safeguarded in the administration of justice will not be neglected if courts look more sharply and deal less summarily when asked to set aside a default judgment for cancellation of citizenship than is required of them in setting aside other default judgments.

It is in the light of these general considerations that I would dispose of the present case. I deem it governed by the liberalizing amendment to Rule 60 (b) of the Federal Rules of Civil Procedure even though that became effective after the decision below. It is of course not a hard and fast rule that procedural changes are

to be prospectively applied to a pending litigation at any stage at which it may be possible to do so without working an injustice. But since citizenship is at stake and this is in effect an appeal in equity to be dealt with as of the time of adjudication, it seems more consonant with equitable considerations to judge the case on the basis of the Rule now in force, even though the lower court did not have the opportunity to apply it.

If the petitioner had paid no attention to the proceeding brought to revoke his citizenship, he would, in my opinion, have no ground for opening up the default judgment simply because during all the years in question he was incarcerated. Men can press their claims from behind prison walls, as is proved by the fact that perhaps a third of the cases for which review is sought in this Court come from penitentiaries. But Klapprott was not indifferent to the proceeding to set aside his citizenship. He took active measures of defense which were aborted through no fault of his own. To be sure, he did not follow up these efforts, but what he is saying in the motion made after his criminal cases were ended is in substance that he was so preoccupied with defending himself against the dire charges of sedition (the conviction for which this Court set aside in *Keegan* v. *United States*, 325 U. S. 478) and the threat of deportation, that the New Jersey cancellation proceeding naturally dropped from his mind after he had taken what he thought appropriate steps for his protection. The Government in effect demurred to this contention and the District Court's action, affirmed by the Court of Appeals, practically ruled as a matter of law that the claim of Klapprott, even if true, affords no relief. It is to me significant that one of the two affirming judges of the Court of Appeals decided the case largely on a close reading of the old Rule 60 (b) and that the other rested his case on laches, while this Court fails to draw on laches for the support of its conclusion.

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Rule 60 (b) now provides five grounds for relief from default judgments and a sixth catch-all ground, "any other reason justifying relief from the operation of the judgment." [1] The only one of the first five reasons to which Klapprott's conduct, as explicitly narrated, may plausibly be assigned is that of "excusable neglect," relief from which must be obtained within a year after a default judgment. But I think that if the inferences fairly to be drawn from the circumstances narrated by Klapprott were found to be true, they would take his case outside of the characterization of "neglect," because "neglect" in the context of its subject matter carries the idea of negligence and not merely of non-action, and would constitute a different reason "justifying relief from the operation of the judgment." When a claim for citizenship is at stake, we ought to read a complaint with a liberality that is the antithesis of Baron Parke's "almost superstitious reverence for the dark technicalities of special pleading."

[1] "RULE 60. RELIEF FROM JUDGMENT OR ORDER.

. . . . . .

"(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . ."

See 15 Dict. Nat. Biog. 226. Therefore, what fairly emanates from such a complaint should be treated as though formally alleged. And so I would not deny Klapprott an opportunity, even at this late stage, to establish as a psychological fact what his allegations imply, namely that the harassing criminal proceedings against him had so preoccupied his mind that he was not guilty of negligence in failing to do more than he initially did in seeking to defend the denaturalization proceeding. But I would not regard such a psychological issue established as a fact merely because the Government in effect demurred to his complaint. Since the nature of the ultimate issue—forfeiture of citizenship—is not to be governed by the ordinary rules of default judgments, neither should the claim of a state of mind be taken as proved simply because the Government, feeling itself justified in resting on a purely legal defense, did not deny the existence of that state of mind.

To rule out the opportunity to establish the psychological implications of the complaint would be to make its denial a rule of law. It would not take much of the trial court's time to allow Klapprott to establish them if he can. The time would be well spent even if he should fail to do so; it would be more consonant with the safeguards which this Court has properly thrown around the withdrawal of citizenship than is the summary disposition that was made. But I would require Klapprott to satisfy the trial judge that what he impliedly alleges is true, and it is here that I part company with the majority.

COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF CHURCH.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 5. Argued October 24, 1947.—Reargued October 12, 1948.—Decided January 17, 1949.

1. In 1924 decedent, then 21 years old, unmarried, and childless, made a transfer in trust in New York in accordance with state law, naming himself and two of his brothers as co-trustees. Certain corporate stocks were transferred to the trustees, who were empowered to hold and sell them and to reinvest the proceeds. Decedent reserved no power to alter, amend, or revoke, but required the trustees to pay to him the income for life. The trust was to terminate at decedent's death, which occurred in 1939. Some provision was made for distribution of the trust assets at decedent's death, but no provision was made for distribution if decedent died without issue and none of his brothers or sisters, or their children, survived him. *Held:* The decedent having reserved the income from the trust property for life, the transfer was one "intended to take effect in possession or enjoyment at or after his death," within the meaning of § 811 (c) of the Internal Revenue Code, and the value of the corpus of the trust was properly included in the gross estate of decedent for purposes of the federal estate tax. Pp. 633–651.
2. A trust transaction cannot be held to alienate all of a settlor's "possession or enjoyment" under § 811 (c) unless it effects a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title, and no right to possess or to enjoy the property then or thereafter. P. 645.
3. *Helvering* v. *Hallock,* 309 U. S. 106, reaffirmed; *May* v. *Heiner,* 281 U. S. 238, held no longer controlling on the interpretation of the "possession or enjoyment" provision of § 811 (c). Pp. 636–646.
4. Reaffirmance of *May* v. *Heiner* is not required by the doctrine of *stare decisis,* nor by the Joint Resolution of March 3, 1931, nor by the decisions of this Court in *Hassett* v. *Welch* and *Helvering* v. *Marshall,* 303 U. S. 303. Pp. 646–651.

161 F. 2d 11, reversed.

The Commissioner determined that the corpus of the trust in question was includible in the decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death. The Tax Court overruled that determination. The Court of Appeals affirmed. 161 F. 2d 11. This Court granted certiorari. 331 U. S. 803. *Reversed,* p. 651.

Arnold Raum argued the cause for petitioner. With him on the briefs were *Solicitor General Perlman, Assistant Attorney General Caudle, Lee A. Jackson* and *L. W. Post. Ellis N. Slack* was also on the brief on the reargument.

William W. Owens argued the cause for respondent. With him on the briefs was *Loren C. Berry. Frederick W. P. Lorenzen* was also on the brief on the reargument.

Briefs of *amici curiae* in support of respondent were filed by *Hugh Satterlee, Rollin Browne* and *Thorpe Nesbit,* for the Estate of Roberts; and *Leland K. Neeves* for the Estate of Lloyd.

Mr. Justice Black delivered the opinion of the Court.

This case raises questions concerning the interpretation of that part of § 811 (c) of the Internal Revenue Code which for estate tax purposes requires including in a decedent's gross estate the value of all the property the decedent had transferred by trust or otherwise before his death which was "intended to take effect in possession or enjoyment at or after his death . . . ." *Estate of Spiegel* v. *Commissioner, post,* p. 701, involves questions which also depend upon interpretation of that provision of § 811 (c). After argument and consideration of the cases at the October 1947 Term, an order was entered restoring them to the docket and requesting counsel upon reargument particularly to discuss certain questions

broader in scope than those originally presented and argued. Journal Supreme Court, June 21, 1948, 296–298. Those additional questions have now been fully treated in briefs and oral arguments.

This case involves a trust executed in 1924 by Francois Church, then twenty-one years of age, unmarried and childless. He executed the trust in New York in accordance with state law. Church and two brothers were named co-trustees. Certain corporate stocks were transferred to the trust with grant of power to the trustees to hold and sell the stocks and to reinvest the proceeds. Church reserved no power to alter, amend, or revoke, but required the trustees to pay him the income for life. This reservation of life income is the decisive factor here.

At Church's death (which occurred in 1939) the trust was to terminate and the trust agreement contained some directions for distribution of the trust assets when he died. These directions as to final distribution did not, however, provide for all possible contingencies. If Church died without children and without any of his brothers or sisters, or their children, surviving him, the trust instrument made no provision for disposal of the trust assets. Had this unlikely possibility come to pass (at his death there were living, five brothers, one sister, and ten of their children) the distribution of the trust assets would have been controlled by New York law. It has been the Government's contention that under New York law had there been no such surviving trust beneficiaries the corpus would have reverted to the decedent's estate. This possibility of reverter plus the retention by the settlor of the trust income for life, the Government has argued, requires inclusion of the value of the trust property in the decedent's gross estate under our holding in *Helvering* v. *Hallock,* 309 U. S. 106.

The *Hallock* case held that where a person while living makes a transfer of property which provides for a reversion of the corpus to the donor upon a contingency terminable at death, the value of the corpus should be included in the decedent's gross estate under the "possession or enjoyment" provision of § 811 (c) of the Internal Revenue Code.[1] In this case, the Tax Court, relying upon its former holdings [2] declared that "The mere possibility of reverter by operation of law upon a failure of the trust, due to the death of all the remaindermen prior to the death of decedent, is not such a possibility as to come within the Hallock case." This holding made it unnecessary for the Tax Court to decide the disputed question as to whether New York law operated to create such a reversionary interest. The United States Court of Appeals for the Third Circuit, one judge dissenting, affirmed on the ground that it could not identify a clear-cut mistake of law in the Tax Court's decision. 161 F. 2d 11. The United States Court of Appeals for the Seventh Circuit in the *Spiegel* case found that under Illinois law there was a possibility of reverter and reversed the Tax Court, holding that possible reversion by operation of law required inclusion of a trust corpus in a decedent's estate. *Commissioner* v. *Spiegel's Estate,* 159 F. 2d 257. Other United States courts of appeal have held the same.[3]

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[1] The *Hallock* case considered the "possession or enjoyment" language of § 811 (c) which appeared in § 302 (c) of the 1926 Revenue Act, 44 Stat. 9, 70, as amended by § 803 (a) of the Revenue Act of 1932, 47 Stat. 169, 279, 26 U. S. C. § 811 (c).

[2] *Estate of Cass,* 3 T. C. 562; *Commissioner* v. *Kellogg,* 119 F. 2d 54, affirming 40 B. T. A. 916; *Estate of Downe,* 2 T. C. 967; *Estate of Houghton,* 2 T. C. 871; *Estate of Goodyear,* 2 T. C. 885; *Estate of Delany,* 1 T. C. 781.

[3] *Commissioner* v. *Bayne's Estate,* 155 F. 2d 475; *Commissioner* v. *Bank of California,* 155 F. 2d 1; *Thomas* v. *Graham,* 158 F. 2d 561; *Beach* v. *Busey,* 156 F. 2d 496.

Because of this conflict we granted certiorari in this and the *Spiegel* case.

Counsel for the two estates have strongly contended in both arguments of these cases that the law of neither New York nor Illinois provides for a possibility of reverter under the circumstances presented. They argue further that even if under the law of those states a possibility of reverter did exist, it would be an unjustifiable extension of the *Hallock* rule to hold that such a possibility requires inclusion of the value of a trust corpus in a decedent's estate. The respondent in this case pointed out the extreme improbability that the decedent would have outlived all his brothers, his sister, and their ten children. He argues that the happening of such a contingency was so remote, the money value of such a reversionary interest was so infinitesimal, that it would be entirely unreasonable to hold that the *Hallock* rule requires an estate tax because of such a contingency. But see *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 324 U. S. 108, 112.

Arguments and consideration of this and the *Spiegel* case brought prominently into focus sharp divisions among courts, judges and legal commentators, as to the intended scope and effect of our *Hallock* decision, particularly whether our holding and opinion in that case are so incompatible with the holding and opinion in *May* v. *Heiner,* 281 U. S. 238, that the latter can no longer be accepted as a controlling interpretation of the "possession or enjoyment" provision of § 811 (c).[4] *May* v. *Heiner* held that the corpus of a trust transfer need not

[4] *Cf. Estate of Hughes,* 44 B. T. A. 1196, with *Estate of Bradley,* 1 T. C. 518, affirmed *sub nom. Helvering* v. *Washington Trust Co.,* 140 F. 2d 87. See *New York Trust Co.* v. *United States,* 100 Ct. Cl. 311, 51 F. Supp. 733. *Cf.* Montgomery, Federal Taxes—Estates, Trusts and Gifts, 461–462, 480–482 (1946) with Paul, Federal Estate and Gift Taxation, 1946 Supp. §§ 7.15, 7.23. See also Note, *Inter*

be included in a settlor's estate, even though the settlor had retained for himself a life income from the corpus. We have concluded that confusion and doubt as to the effect of our *Hallock* case on *May* v. *Heiner* should be set at rest in the interest of sound tax and judicial administration. Furthermore, if *May* v. *Heiner* is no longer controlling, the value of the Church trust corpus was properly included in the gross estate, without regard to the much discussed state law question, since Church reserved a life estate for himself. For reasons which follow, we conclude that the *Hallock* and *May* v. *Heiner* holdings and opinions are irreconcilable. Since we adhere to *Hallock,* the *May* v. *Heiner* interpretation of the "possession or enjoyment" provisions of § 811 (c) can no longer be accepted as correct.

The "possession or enjoyment" provision appearing in § 811 (c) seems to have originated in a Pennsylvania inheritance tax law in 1826.[5] As early as 1884 the Supreme Court of Pennsylvania held that where a legal transfer of property was made which carried with it a right of possession with a reservation by the grantor of income and profits from the property for his life, the transfer was not intended to take effect in enjoyment until the grantor's death: "One certainly cannot be considered, as in the actual enjoyment of an estate, who has no right to the profits or incomes arising or accruing therefrom." *Reish, Adm'r* v. *Commonwealth,* 106 Pa. 521, 526. That court further held that the "possession or enjoyment" clause did not involve a mere technical question of title, but that the law imposed the death tax unless one had parted

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Vivos Transfers and the Federal Estate Tax, 49 Yale L. J. 1118 (1940); Eisenstein, *Estate Taxes and the Higher Learning of the Supreme Court,* 3 Tax L. Rev. 395 (1948).

[5] Note, *Origin of the Phrase, "Intended To Take Effect in Possession or Enjoyment At or After . . . Death"* (§ 811 (c), *Internal Revenue Code*), 56 Yale L. J. 176 (1946).

during his life with his possession and his title and his enjoyment. It was further held in that case that the test of "intended" was not a subjective one, that the question was not what the parties intended to do, but what the transaction actually effected as to title, possession and enjoyment.

Most of the states have included the Pennsylvania-originated "possession or enjoyment" clause in death tax statutes, and with what appears to be complete unanimity, they have up to this day, despite *May* v. *Heiner*, substantially agreed with this 1884 Pennsylvania Supreme Court interpretation.[6] Congress used the "possession or enjoyment" clause in death tax legislation in 1862, 1864, and 1898. 12 Stat. 432, 485; 13 Stat. 223, 285; 30 Stat. 448, 464. In referring to the provision in the 1898 Act, this Court said that it made "the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof." *Vanderbilt* v. *Eidman*, 196 U. S. 480, 493. And five years before the 1916 estate tax statute incorporated the "possession or enjoyment" clause to frustrate estate tax evasions, 39 Stat. 756, 780, this Court had affirmed a judgment of the New York Court of Appeals sustaining the constitutionality of its state inheritance tax in an opinion which said: "It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate." *Matter of Keeney*, 194 N. Y. 281, 287, 87 N. E. 428, 429; *Keeney* v. *New York*, 222 U. S. 525. And see *Helvering* v. *Bullard*, 303 U. S. 297, 302,

[6] See cases collected in 49 A. L. R. 878–892; 67 A. L. R. 1250–1254; 100 A. L. R. 1246–1254. See also Rottschaefer, *Taxation of Transfers Taking Effect in Possession at Grantor's Death*, 26 Iowa L. Rev. 514 (1941); Oliver, *Property Rationalism and Tax Pragmatism*, 20 Tex. L. Rev. 675, 704–709 (1942).

where the foregoing quotation was repeated with seeming approval.

From the first estate tax law in 1916 until *May* v. *Heiner, supra,* was decided in 1930, trust transfers which were designed to distribute the corpus at the settlor's death and which reserved a life income to the settlor had always been treated by the Treasury Department as transfers "intended to take effect in possession or enjoyment at . . . his death." The regulations had so provided and millions of dollars had been collected from taxpayers on this basis. See *e. g.,* T. D. 2910, 21 Treas. Dec. 771 (1919); and see 74 Cong. Rec. 7078, 7198–7199 (March 3, 1931). This principle of estate tax law was so well settled in 1928, that the United States Court of Appeals decided *May* v. *Heiner* in favor of the Government in a one-sentence *per curiam* opinion. 32 F. 2d 1017. Nevertheless, March 2, 1931, this Court followed *May* v. *Heiner* in three cases in *per curiam* opinions, thus upsetting the century-old historic meaning and the long standing Treasury interpretation of the "possession or enjoyment" clause. *Burnet* v. *Northern Trust Co.,* 283 U. S. 782; *Morsman* v. *Burnet,* 283 U. S. 783; *McCormick* v. *Burnet,* 283 U. S. 784.

March 3, 1931, the next day after the three *per curiam* opinions were rendered, Acting Secretary of the Treasury Ogden Mills wrote a letter to the Speaker of the House explaining the holdings in *May* v. *Heiner* and the three cases decided the day before. He pointed out the disastrous effects they would have on the estate tax law and urged that Congress "in order to prevent tax evasion," immediately "correct this situation" brought about by *May* v. *Heiner* and the other cases. 74 Cong. Rec. 7198, 7199 (1931). He expressed fear that without such action the Government would suffer "a loss in excess of one-third of the revenue derived from the Federal estate tax, with

anticipated refunds of in excess of $25,000,000." The Secretary's surprise at the decisions and his apprehensions as to their tax evasion consequences were repeated on the floor of the House and Senate. 74 Cong. Rec. *supra.* Senator Smoot, Chairman of the Senate Finance Committee, said on the floor of the Senate that this judicial interpretation of the statute "came almost like a bombshell, because nobody ever anticipated such a decision." 74 Cong. Rec. 7078. Both houses of Congress unanimously passed and the President signed the requested resolution that same day.[7]

February 28, 1938, this Court held that neither passage of the resolution nor its later inclusion in the 1932 Revenue Act was intended to apply to trusts created before its passage. *Hassett* v. *Welch, Helvering* v. *Marshall,* 303 U. S. 303. Accordingly, if the corpus of the Church trust executed in 1924 is to be included in the settlor's estate without this Court's involvement in the intricacies of state property law, it must be done by virtue of the possession and enjoyment section as it stood without the language added by the joint resolution.

Crucial to the Court's holding in *May* v. *Heiner* was its finding that no interest in the corpus passed at the settlor's death because legal title had passed from the settlor irrevocably when the trust was executed; for this reason the

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[7] "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom . . .*" The italics are added to indicate the additions made by the amendments to § 302 (c) of the Revenue Act of 1926. Joint Resolution of March 3, 1931, 46 Stat. 1516–1517.

grantor's reservation of the trust income for his life [8]—one of the chief bundle-of-ownership interests—was held not to bring the transfer within the category of transfers "intended to take effect in . . . enjoyment at . . . his death." This Court had never before so limited the possession or enjoyment section.[9] Thus was formal legal title rather than the substance of a transaction made the sole test of taxability under § 811 (c). For from the viewpoint of the grantor the significant effect of this transaction was his continued enjoyment and retention of the income until his death; the important consequence to the remaindermen was the postponement of their right to this enjoyment of the income until the grantor's death.

The effect of the Court's interpretation of this estate tax section was to permit a person to relieve his estate from the tax by conveying its legal title to trustees whom he selected, with an agreement that they manage the estate during his life, pay to him all income and profits from the property during his life, and deliver it to his

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[8] The *May* v. *Heiner* trust provided for the income to go to Barney May during his lifetime, after his death to his wife, Pauline May, the grantor, and upon her death the corpus was to be distributed to the grantor's four children. The Court said that the record failed clearly to disclose whether Mrs. May survived her husband, but held this was of no special importance.

[9] The Court also quoted from and relied heavily on *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345. This Court there held that the corpus of two trusts that reserved a life income to the grantor plus a power to revoke should have been included in the decedent's estate. The corpus of five other trusts were held not includable. These five trusts did not reserve a power in the grantor alone to revoke, nor did they reserve a life estate to the grantor, but they provided for accumulation of that income during the settlor's life, and at his death it was to go to the beneficiaries, subject to prior use by the beneficiaries as directed by the settlor. Thus, this case did not directly support the *May* v. *Heiner* holding. Nor is *May* v. *Heiner* supported by *Shukert* v. *Allen*, 273 U. S. 545, as shown by reference to *Shukert* v. *Allen* in the *Reinecke* opinion at p. 347.

chosen beneficiaries at death. Preparation of papers to defeat an estate tax thus became an easy chore for one skilled in the "various niceties of the art of conveyancing." *Klein* v. *United States,* 283 U. S. 231, 234. And by this simple method one could, despite the "possession or enjoyment" clause, retain and enjoy all the fruits of his property during life and direct its distribution at death, free from taxes that others less skilled in tax technique would have to pay. Regardless of these facts *May* v. *Heiner* held that such an instrument preserving the beneficial use of one's property during life and providing for its distribution and delivery at death was "not testamentary in character." *May* v. *Heiner, supra* at 243. *Cf. Keeney* v. *New York, supra* at 535, 536.

One year after *May* v. *Heiner,* this Court decided *Klein* v. *United States, supra.* There the grantor made a deed conveying property to his wife for her life with provisions that if she survived him she should "by virtue of this conveyance take, have, and hold the said lands in fee simple," but the fee was to "remain vested in" him should his wife die first. This Court pointed out that in general and under the law of Illinois where the deed was made, vesting of title in the grantee "depended upon the condition precedent that the death of the grantor happen *before* that of the grantee." Thus, since it was found that under Illinois law legal title to the land had been retained by the husband, it was held that the value of the land should be included in his gross estate under the "possession or enjoyment" section. The Court did not cite *May* v. *Heiner.*

In 1935, this Court decided *Helvering* v. *St. Louis Trust Co.,* 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.,* 296 U. S. 48. In each of these cases the Court again, as in *May* v. *Heiner,* delved into the question of legal title under rather subtle property law concepts and decided that the legal title of the trust properties there,

unlike the situation in the Klein transfer, had passed irrevocably from the grantor. This passage of bare legal title was held to be enough to render the possession or enjoyment section inapplicable. These cases were expressly overruled by *Helvering* v. *Hallock*.

Helvering v. *Hallock* was decided in 1940. Three separate trusts were considered in the *Hallock* case. These three trusts as those considered in the *St. Louis Trust* and *Becker* cases, had been executed with provisions for reversion of the trust properties to the grantors should the grantors outlive the beneficiaries. The trusts had been executed in 1917, 1919, and 1925. In the *Hallock* case this Court was again asked to limit the effect of § 811 (c) by emphasis upon the formal passage of legal title. By such concentration on elusive legal title, the Court was invited to lose sight of the plain fact that complete enjoyment had been postponed. We declined to limit the effectiveness of the possession or enjoyment provision of § 811 (c) by attempting to define the nature of the interest which the decedent retained after his *inter vivos* transfer. We called attention to the snares which inevitably await an attempt to restrict estate tax liability on the "niceties of the art of conveyancing" at p. 117. We declared that the statute now under consideration "taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise," p. 112, and *inter vivos* gifts "resorted to, as a substitute for a will, in making dispositions of property operative at death," p. 114.

As pointed out by the dissent in *Hallock,* we there directly and unequivocally rejected the only support that could possibly suffice for the holdings in *May* v. *Heiner*. That support was the Court's conclusion in *May* v. *Heiner*

that retention of possession or enjoyment of his property was not enough to require inclusion of its value in the gross estate if a trust grantor had succeeded in passing bare legal title out of himself before death. In *Hallock* we emphasized our removal of that support by declaring that § 811 (c) "deals with property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment," pp. 110–111.

Moreover, the *Hallock* case, p. 114, stands plainly for the principle that "In determining whether a taxable transfer becomes complete only at death we look to substance, not to form . . . However we label the device [if] it is but a means by which the gift is rendered incomplete until the donor's death" the "possession or enjoyment" provision applies.

How is it possible to call this trust transfer "complete" except by invoking a fiction? Church was sole owner of the stocks before the transfer. Probably their greatest property value to Church was his continuing right to get their income. After legal title to the stocks was transferred, somebody still owned a property right in the stock income. That property right did not pass to the trust beneficiaries when the trust was executed; it remained in Church until he died. He made no "complete" gift effective before that date, unless we view the trust transfer as a "complete" gift to the trustees. But Church gave the trustees nothing, either partially or completely. He transferred no right to them to get and spend the stock income. And under the teaching of the *Hallock* case, quite in contrast to that of *May* v. *Heiner*, passage of the mere technical legal title to a trustee is not necessarily crucial in determining whether and when a gift becomes "complete" for estate tax purposes. Looking to substance and not merely to form,

as we must unless we depart from the teaching of *Hallock,* the inescapable fact is that Church retained for himself until death a most valuable property right in these stocks—the right to get and to spend their income. Thus Church did far more than attach a "string" to a remotely possible reversionary interest in the property, a sufficient reservation under the *Hallock* rule to make the value of the corpus subject to an estate tax. Church did not even risk attaching an unbreakable cable to the most valuable property attribute of the stocks, their income. He simply retained this valuable property, the right to the income, for himself until death, when for the first time the stock with all its property attributes "passed" from Church to the trust beneficiaries. Even if the interest of Church was merely "obliterated," in *May* v. *Heiner* language, it is beyond all doubt that simultaneously with his death, Church no longer owned the right to the income; the beneficiaries did. It had then "passed." It never had before. For the first time, the gift had become "complete."

Thus, what we said in *Hallock* was not only a repudiation of the reasoning which was advanced to support the two cases (*St. Louis Trust* and *Becker*) that *Hallock* overruled, but also a complete rejection of the rationale of *May* v. *Heiner* on which the two former cases had relied. *Hallock* thereby returned to the interpretation of the "possession or enjoyment" section under which an estate tax cannot be avoided by any trust transfer except by a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title, and no right to possess or to enjoy the property then or thereafter.

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In other words such a transfer must be immediate and out and out, and must be unaffected by whether the grantor lives or dies. See *Shukert* v. *Allen,* 273 U. S. 545, 547; *Smith* v. *Shaughnessy,* 318 U. S. 176. We declared this to be the effect of the *Hallock* case in *Goldstone* v. *United States,* 325 U. S. 687, 690, 691. There we said with reference to § 811 (c) in connection with our *Hallock* ruling: ". . . It thus sweeps into the gross estate all property the ultimate possession or enjoyment of which is held in suspense until the moment of the decedent's death or thereafter. . . . Testamentary dispositions of an *inter vivos* nature cannot escape the force of this section by hiding behind legal niceties contained in devices and forms created by conveyancers." And see *Fidelity-Philadelphia Trust Co.* v. *Rothensies, supra,* and *Commissioner* v. *Estate of Field,* 324 U. S. 113.

It is strongly urged that we continue to regard *May* v. *Heiner* as controlling and leave its final repudiation to Congress. Little effort is made to defend the *May* v. *Heiner* interpretation of "possession or enjoyment" on the ground that it truly reflects the congressional purpose, nor do we think it possible to attribute such a purpose to Congress. There is no persuasive argument, if any at all, that trusts reserving life estates with remainders over at grantors' deaths are not satisfactory and effective substitutes for wills. In fact, the purpose of this settlor as expressed in his trust papers was to make "provision for any lawful issue" he might "leave at the time of his death as well as provide an income for himself for life." This paper, labeled a trust, but providing for all the substantial purposes of a will, was intended to and did postpone until the settlor's death the right of his relatives to possess and enjoy his property. There may be trust instruments that fall more clearly within the class intended to be treated as substitutes for wills by the "possession or enjoyment" clause, but we doubt it.

The argument for continuing the error of *May* v. *Heiner* is not on the merits but is advanced in the alleged interest of tax stability and certainty, *stare decisis* and a due deference to the just expectations of those who have relied on the *May* v. *Heiner* doctrine. Special stress is laid on Treasury regulations which since the *Hassett* v. *Welch* holding in 1938 have accepted the *May* v. *Heiner* doctrine and have not provided that the value of a trust corpus must be included in the decedent's gross estate where a grantor had reserved the trust income. It is even argued that Congress in some way ratified the *May* v. *Heiner* doctrine when it passed the joint resolution and that if not, the decision in the *Hassett* and *Marshall* cases set at rest all questions as to the soundness of the *May* v. *Heiner* interpretation. We find no merit in these contentions.

What was said in the *Hallock* opinion on the question of *stare decisis* would appear to be a sufficient answer to that contention here. The *Hallock* opinion also answers the argument as to recent Treasury regulations, all of which were made by the Treasury under compulsion of this Court's cases. Furthermore, the history of the struggle of the Treasury to subject such transfers as this to the estate tax law, a history shown in part in the *Hassett* v. *Welch* opinion, has served to spotlight the abiding conviction of the Treasury that the *May* v. *Heiner* statutory interpretation should be rejected. In view of the struggle of the Treasury in this tax field, the variant judicial and Tax Court opinions, our opinion in the *Hallock* case and others which followed, it is not easy to believe that taxpayers who executed trusts prior to the 1931 joint resolution felt secure in a belief that *May* v. *Heiner* gave them a vested interest in protection from estate taxes under trust transfers such as this one. And so far as this trust is concerned, Treasury regulations required the value of its corpus to be included in the gross estate when it was

made in 1924, and most of the period from then up to the settlor's death in 1939.

Moreover, the *May* v. *Heiner* doctrine has been repudiated by the Congress and repeatedly challenged by the Treasury. It certainly is not an overstatement to say that this Court's *Hallock* opinion and holding treated *May* v. *Heiner* with scant respect. We said Congress had "displaced" the *May* v. *Heiner* construction of § 811 (c); in overruling the *St. Louis Trust* cases we pointed out that those cases had relied in part on the "Congressionally discarded *May* v. *Heiner* doctrine"; we thought Congress "had in principle already rejected the general attitude underlying" the *May* v. *Heiner* and *St. Louis Trust* cases; and finally our *Hallock* opinion demolished the only reasoning ever advanced to support the *May* v. *Heiner* holding. And in the *Hallock* case, trusts created in 1917, 1919, and 1925 were held subject to the estate tax under the provisions included in § 811 (c). What we said and did about *May* v. *Heiner* in the *Hallock* case took place in 1940, two years after *Hassett* v. *Welch* had held that the 1931 and 1932 amendments could not be applied to trusts created before 1931. Certainly, *May* v. *Heiner* cannot be granted the sanctuary of *stare decisis* on the ground that it has had a long and tranquil history free from troubles and challenges.

Nor does the joint resolution or the opinion in the *Hassett* v. *Welch* and *Helvering* v. *Marshall* cases, decided together, support an argument that the *May* v. *Heiner* doctrine be left undisturbed. It would be impossible to say that Congress in 1931 intended to accept and ratify decisions that hit the Congress like a "bombshell." [10]

[10] A May 22, 1931, bulletin of the Treasury Department indicates a strong reason for the Treasury Department's construction of the resolution as inapplicable to pre-1931 trust transfers. T. D. 4314, X–1, Cum. Bull. 450–451 (1931). That reason was obviously a fear that this Court might hold that the tax could not constitutionally

And in *Hassett* v. *Welch* the Government did not ask this Court to reexamine or overrule *May* v. *Heiner* or the three *per curiam* cases that relied on *May* v. *Heiner*. In fact, the government brief argued that *May* v. *Heiner* on its facts was distinguishable from *Hassett* v. *Welch*. The government brief also pointedly insisted that its position in *Hassett* v. *Welch* did "not require a reexamination of the three *per curiam* decisions of March 2, 1931." It was the Government's sole contention in the *Hassett* and *Marshall* cases that the 1932 reenactment of the joint resolution was not limited in application to trusts thereafter created, but was intended to make the new 1932 amendment applicable to past trust agreements. That contention was rejected. The holding was limited to that single question.

The plain implications of the *Hallock* opinion recognize that the *Hassett* and *Marshall* cases did not reaffirm the *May* v. *Heiner* doctrine. In the *Marshall* case the trust, created in 1920, contained a provision that should the settlor outlive the trust beneficiary, the trust corpus would revert to the settlor. That is the very type of provision which we held in *Hallock* would require inclusion of its value in the settlor's estate. Since the *Hallock* case did not overrule the *Marshall* case involving a trust created in 1920, it must have accepted the *Marshall* and *Hassett* cases as deciding no more than that the value of the trust properties there could not be included in the de-

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be applied to trusts previously created under the *Nichols* v. *Coolidge*, 274 U. S. 531, line of cases. This same apprehension may well have been the underlying reason for a statement, relied on by the dissent, made on the floor of the House that the resolution was not made "retroactive for the reason that we were afraid that the Senate would not agree to it." 74 Cong. Rec. 7199 (1931). Recent cases have indicated that the fear of such a constitutional interpretation is not a valid one. *Central Hanover Bank* v. *Kelly*, 319 U. S. 94, 97–98; *Fernandez* v. *Wiener*, 326 U. S. 340, 355.

cedent's gross estate where the Government's sole reliance was on a retroactive application of the 1931 and 1932 amendments to the estate tax law.

That the *Hallock* opinion did not treat the *Hassett* and *Marshall* cases as having reaffirmed this Court's interpretation of the pre-1931 possession or enjoyment clause is further emphasized by the effect of the *Hallock* case on the type of trust in *McCormick* v. *Burnet*, 283 U. S. 784, a trust created before 1931. The United States Court of Appeals in that case had held that the trust property should be included in the decedent's estate chiefly because of the trust provision that the corpus should revert to the settlor in the event that she outlived her three children. 43 F. 2d 277. This Court in its *per curiam* opinion reversed the Court of Appeals and held that the McCormick corpus need not be included in the decedent's estate. Our *Hallock* case held directly the contrary, for since *Hallock*, the McCormick corpus would have to be taxed under the pre-1931 language of § 811 (c). In so interpreting the pre-1931 language in the *Hallock* case, we necessarily rejected the contention made there that the Congress by passage of the resolution and this Court by the *Hassett* and *Marshall* opinions had accepted as correct the *May* v. *Heiner* restrictive interpretation of § 811 (c). It is plain that this Court in the *Hallock* case considered that the *Hassett* and *Marshall* cases held no more than that the 1931 and 1932 amendments were prospective, and that neither the congressional resolution nor the *Hassett* and *Marshall* cases were designed to give new life and vigor to the *May* v. *Heiner* doctrine.[11]

[11] A dissent filed in this case has an appendix citing "DECISIONS DURING THE PAST DECADE IN WHICH LEGISLATIVE HISTORY WAS DECISIVE OF CONSTRUCTION OF A PARTICULAR STATUTORY PROVISION," *post*, p. 687. Many other decisions of less recent date could also be cited to establish this well-known fact which nobody disputes. But we think

The reliance of respondent here on the *Hassett* and *Marshall* cases is misplaced. We hold that this trust agreement, because it reserved a life income in the trust property, was intended to take effect in possession or enjoyment at the settlor's death and that the Commissioner therefore properly included the value of its corpus in the estate.

Reversed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE REED, concurring in No. 3, *Spiegel* v. *Commissioner, post,* p. 701, and dissenting in No. 5, *Commissioner* v. *Church, ante,* p. 632.

As these tax decisions may have an influence on subsequent decisions beyond the limited area of the issues decided, I have thought it advisable to state my position for whatever light it may throw. I agree with the judg-

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here, in the language of our opinion in the *Hallock* case, which opinion was written by the author of today's dissent, that the actions of Congress relied on in the dissent have not "under any rational canons of legislative significance . . . impliedly enacted into law a particular decision which, in the light of later experience, is seen to create confusion and conflict in the application of a settled principle of internal revenue legislation." *Helvering* v. *Hallock,* 309 U. S. 106, 121, note 7. The basic "settled principle" now as when *Hallock* was written is that where a trust agreement reserves the settlor's possession or enjoyment of part or all of the trust property until death, the value of the trust should be included in the settlor's gross estate.

The arguments in dissent here based on *stare decisis,* legislative history, and possible consequences of this Court's holding, are strikingly like the forceful arguments made in the *Hallock* dissent. But the persuasive and sound arguments advanced by the Court's spokesman in *Hallock* were there considered by the majority of this Court to be a sufficient answer to what was said in the *Hallock* dissent. Particularly forceful was this Court's statement in the *Hallock* opinion that "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

ment directed by the Court in *Spiegel* v. *Commissioner* and with so much of the opinion as rests solely upon the controlling effect of the possibility of reverter under the law of Illinois. As I disagree with *Church* v. *Commissioner,* decided today, I cannot accept so much of the opinion in the *Spiegel* case, p. 705, as seems to put reliance upon the fact that the settlor as trustee retains any "possession or enjoyment" of the trust, other than a possibility of reverter. I am opposed to the view expressed in the dissent written by Mr. Justice Burton that the settlor's intent rather than the effect of his acts is the touchstone to determine the taxability of his property for estate tax purposes.

So far as *Commissioner* v. *Church* is concerned, I do not believe that *May* v. *Heiner,* 281 U. S. 238, should be overruled. The Joint Resolution of March 3, 1931, therefore, stands as the determinative factor in reaching a conclusion as to the taxability of the Church estate. *Hassett* v. *Welch,* 303 U. S. 303, decided that the Resolution was not retroactive. Consequently, the Church estate is not subject to an estate tax because of the reservation of a life estate.

We are asked to accept an overruling of *May* v. *Heiner, supra,* and also, I think, of *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, not to mention the incidental fall of *Hassett* v. *Welch, supra,* on the one side, or, on the other hand, to limit the rule as to the possibility of reverter in *Helvering* v. *Hallock,* 309 U. S. 106, and the numerous cases that follow its teaching, to reverters expressly reserved in the documents. Legislation indicates a purpose to promote gifts as a desirable means for early distribution of property benefits. In reliance upon a long-settled course of legislative and judicial construction, donors have made property arrangements that should not now be upset summarily with no stronger reasons for doing so than that former courts

and the Congress did not interpret the legislation in the same way as this Court now does. Judicial efforts to mold tax policy by isolated decisions make a national tax system difficult to develop, administer or observe. For more than thirty years Congress has legislated upon this problem and this Court has interpreted the enactments so that now what seems to me a reasonably fair interpretation of tax liability under § 811 (c) of the Internal Revenue Code, as now written, has been worked out. Relying upon the desirability of *stare decisis* under the decisions concerning § 811 (c), I would leave such changes as may seem desirable to the Congress, where general authority for that purpose rests.

(1) A provision including in a decedent's estate the value at time of death of interest in any transfer by trust "in contemplation of or intended to take effect in possession or enjoyment at or after his death" has been in the federal estate tax law since the Income Tax Act of 1916.[1] It will be noted that the phrase relating to a transfer "in contemplation of or intended to take effect in possession or enjoyment at or after his [settlor's] death" has not changed. It was construed by this Court, at first, to apply to those circumstances where something passed

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[1] This provision first appeared in § 202 (b) of the Revenue Act of 1916, 39 Stat. 756, 777–78, and read as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

. . . . . .

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. . . ."

With small changes it was included in § 402 (c) of the Revenue Acts of 1918 and 1921, 40 Stat. 1057, 1097; 42 Stat. 227, 278, and in

from the "possession, enjoyment or control of the donor at his death." *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348. "Of course it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute." *Shukert* v. *Allen*, 273 U. S. 545, 547. When, after the execution of a trust, the settlor "held no right in the trust estate which in any sense was the subject of testamentary disposition," this Court was of the opinion that the gift was not intended to take effect in possession or enjoyment at the donor's death. *Helvering* v. *St. Louis Union*

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§ 302 (c) of the Revenue Acts of 1924 and 1926, 43 Stat. 253, 304; 44 Stat. 9, 70. In 1931 the provision was amended by H. J. Res. No. 529, 46 Stat. 1516, and assumed its present form in the Revenue Act of 1932, 47 Stat. 169, 279. It now reads as follows:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

. . . . . .

"(c) Transfers in contemplation of, or taking effect at death.

"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. . . ."

The italicized words are the additions made by the amendments of 1931 and 1932 to § 302 (c) of the Revenue Act of 1926. See *Hassett* v. *Welch*, 303 U. S. at 307–308. The underscored phrase at the end of the first paragraph was added by the Revenue Act of 1934, § 404, 48 Stat. 680, 754. There has been no further change.

Tr. Co., 296 U. S. 39, 43; *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 88; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784; *May* v. *Heiner*, 281 U. S. 238. A reserved power of appointment or change is, in a sense, a testamentary power over the corpus. *Reinecke* v. *Northern Trust Co.*, *supra*, at 345; *Porter* v. *Commissioner*, 288 U. S. 436.

Klein v. *United States*, 283 U. S. 231, brought doubt into the above conception of the meaning of the phrase in question. That trust was to A for life and on condition that A survive the donor to A in fee simple. It was the death of the donor that "brought the larger estate into being . . . and effected its transmission from the dead to the living," this Court said in upholding the tax on the trust property. This was construed by four members of the Court to mean that the donor's death "operating upon his gift *inter vivos* not complete until his death, is the event which calls the statute into operation." Mr. Justice Stone, dissenting in the later case of *Helvering* v. *St. Louis Trust Co.*, *supra*, 46. The two positions, one that only power in the settlor at the time of death to cause the property to be transferred from him to another by will or by descent or to select beneficiaries through appointment brought the property formerly transferred within the reach of the words "intended to take effect in possession or enjoyment at or after his death," the *Reinecke* concept, and the other that, in addition, every possibility of reversion of the transferred interest to the settlor must be barred by the trust instrument, the dissenter's ground in *Helvering* v. *St. Louis Trust Co.*, were fully discussed in the majority and dissenting opinions in *Helvering* v. *Hallock*, 309 U. S. 106.[2] The latter

[2] Whether the taxable event is the "transfer *inter vivos*," as we suggested in *Helvering* v. *Hallock*, 309 U. S. 106, 111, see *Shukert*

position was accepted as the sound interpretation by us and I adhere to that view for the reasons stated in the Court's opinion in *Helvering* v. *Hallock*. Cf. Eisenstein, *Estate Taxes and the Higher Learning of the Supreme Court*, 3 Tax Law Rev. 395. That interpretation has gained strength from the fact that Congress has not repudiated it as inconsistent with the legislative purpose and by other judgments by this Court applying the principles of the *Hallock* case in accordance with this statement. *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108; *Commissioner* v. *Estate of Field*, 324 U. S. 113. Possession or enjoyment of property as heretofore applied has meant from the standpoint of the taxability of the transferor's estate, at least, that the death of the transferor perfects the right of the transferee and cuts off any possibility of reverter to the transferor left by the instruments of transfer. If the transferor

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v. *Allen*, 273 U. S. 545, 546, and *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108, 110–11, or the transfer at death, as now seems to me more precise, seems immaterial. See Int. Rev. Code § 810; dissent in *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, 46–47; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347. It was said of a transfer in contemplation of death, "It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death." *Milliken* v. *United States*, 283 U. S. 15, 23; *Heiner* v. *Donnan*, 285 U. S. 312, 330, cf. dissent at 334. In either case transfer of an interest in property intended to take effect in possession or enjoyment at or after death is taxed. If taxed as an excise on the privilege of transfer at death, the transferee has taken subject to the tax. Int. Rev. Code § 827 (b). It is a means of checking tax avoidance. Cf. *Milliken* v. *United States*, 283 U. S. 15, 20. See *Helvering* v. *Bullard*, 303 U. S. 297, an estate tax on a trust that retained a life estate. We there said, pp. 301–2, "A further vindication of the exaction is the authority of Congress to treat as testamentary, transfers with reservation of a power or an interest in the donor." See *Fernandez* v. *Wiener*, 326 U. S. 340, 352; cf. *Heiner* v. *Donnan*, 285 U. S. 312, 331–32.

reacquired the property by inheritance or by purchase, other factors would enter. Before the Joint Resolution even the reservation of a life estate was insufficient to preserve possession or enjoyment in the transferor as nothing passed at his death. When words such as "possession or enjoyment" used in a section of a revenue statute with their many possible shades and ambiguities of meaning have been given definition through the course of legislation and litigation, a change by courts should be avoided.[3] By the Resolution such a reservation or that of power of appointment was also made the source of an estate tax.

Prior cases have involved trust instruments where the settlor specifically reserved remainders, reverters or contingent powers of appointment. In these cases the value at death of the entire corpus of the trusts was taxed. This was because in each case there was a contingency through which completed gifts of the entire corpus to the beneficiaries might fail before the death of the settlor with the result that the settlor would again control the transfer of the corpus.[4] In such circumstances, I take it as settled that the property is taxable on the event of the settlor's death under §§ 810 and 811 (c). Cf. 324 U. S. at 111.

The trust instruments in the present cases of the Spiegel and Church estates do not specifically provide for such possibility of reverter or for regaining control of the devolution of the property. The issue raised by these cases is whether a like possibility of reverter springing not from the instrument but by operation of law through the failure of all beneficiaries named in the trust instru-

[3] *National Safe Deposit Co.* v. *Stead*, 232 U. S. 58, 67.

[4] *Helvering* v. *Hallock*, 309 U. S. 106; *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108; *Commissioner* v. *Estate of Field*, 324 U. S. 113; *Goldstone* v. *United States*, 325 U. S. 687.

ment shall have the same effect. All named beneficiaries in these two trusts might die before the settlors without surviving issue. Thus, depending upon the controlling state law, the settlors might repossess the estates.[5]

To lay bare the heart of the problem, it seems helpful to put aside certain phases of possible congressional intention and possible statutory meaning, as not involved or heretofore decided for sound reasons.

A. It was not the purpose of Congress at any time in dealing with the inclusion of transfers of property in trust to have the whole value, at the donor's death, of the total of all gifts made during life, included in the settlor's

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[5] Since the state law defines and creates rights and interests in property and the federal taxing statutes only say which of these rights and interests created by state law shall be taxed, the law of Illinois controls the construction of this trust. *Helvering* v. *Stuart*, 317 U. S. 154, 161–63; *Blair* v. *Commissioner*, 300 U. S. 5, 9–10.

The trustee in the *Spiegel* case could act only in the interest of the beneficiaries of the trust.

It is well established in Illinois as in other jurisdictions that a trustee in the absence of express authority cannot deal on his own behalf with any part of the trust property. *Doner* v. *Phoenix Joint Stock Land Bank of Kansas City*, 381 Ill. 106, 45 N. E. 2d 20; *Kinney* v. *Lindgren*, 373 Ill. 415, 26 N. E. 2d 471; *City of Chicago* v. *Tribune Co.*, 248 Ill. 242, 93 N. E. 757; and in determining the powers of the trustee reference must be had to the intention of the grantor as manifested in the whole trust instrument. *Crow* v. *Crow*, 348 Ill. 241, 180 N. E. 877; *Bear* v. *Millikin Trust Co.*, 336 Ill. 366, 168 N. E. 349; *Harris Trust & Savings Bank* v. *Wanner*, 326 Ill. App. 307, 61 N. E. 2d 860. Even though a trustee has been vested with full power and discretion as to the management of the trust he is still subject to the control of the equity court, and this discretion cannot be exercised by the trustee so as to defeat the trust or to deprive the *cestui que trust* of its benefits. *Maguire* v. *City of Macomb*, 293 Ill. 441, 127 N. E. 682; *Jones* v. *Jones*, 124 Ill. 254, 15 N. E. 751. This rule that the trustee must administer the trust solely in the interest of the *cestui que trust* has the support of both reason and authority. See *Helvering* v. *Stuart*, 317 U. S. 154, 162–66; Restatement, Trusts § 170; 2 Scott, Trusts § 187.

estate for estate tax purposes.[6] The words of the statute show this. See note 1, *supra*. Gifts in trust are taxable only where an interest remains in the donor. Therefore a gift by A to a trust company to hold in trust for B during B's life and at B's death to C, his heirs, devisees or assigns is not taxable under § 811 (c). *Reinecke* v. *Northern Trust Co., supra,* 347–48. Before the amendment of 1931[7] the retention of an estate for life in the settlor did not subject the trust to estate tax where the remainder was taken by beneficiaries without regard to future action by the settlor.[8]

B. The Joint Resolution of 1931 made no change in the language of the subsection of the estate tax relating to the inclusion in estates of interests in trusts intended to take effect in possession or enjoyment at or after death. Neither the resolution nor the discussion on the floor of either house suggested a change in the words of the section to define what is meant by an interest intended to take effect after death. Congress aimed at the retention of life interests, not at this Court's determinations of the meaning of "possession or enjoyment." Those words were left untouched and an addition was made providing for the inclusion in the estate of interests where the settlor had retained the possession or enjoyment of the property or a right to income or the power to designate the beneficiaries. See note 1, *supra*. Therefore the words relating to intention, death, possession or enjoyment have the same meaning now as they did

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[6] This statement does not refer to the items of deduction or exemption covered by Int. Rev. Code § 812 but to the value of gifts not covered by § 812 that also are not covered by § 811.

[7] 46 Stat. 1516.

[8] *May* v. *Heiner,* 281 U. S. 238; *Burnet* v. *Northern Trust Co.,* 283 U. S. 782; *Morsman* v. *Burnet,* 283 U. S. 783; *McCormick* v. *Burnet,* 283 U. S. 784.

before the 1931 amendment was adopted.[9] The doctrine of *May* v. *Heiner* that the statute, as written when that case was handed down, did not cover reservations of life interests and powers of designation was legislatively changed by adding the words of the Joint Resolution. See in accord *Helvering* v. *Hallock, supra.* When *Hallock* there refers to the doctrine of *May* v. *Heiner* discarded by Congress, it is the doctrine of *May* v. *Heiner* that a settlor might reserve a life interest that was meant. *Hallock* did not say or imply, as I read it, that the *May* v. *Heiner* doctrine, which is supported by *Reinecke* and *Shukert* v. *Allen,* as to when "possession or enjoyment" passes from a donor was changed by the Resolution. These cases had held that something must pass from the settlor. The only difference wrought by *Hallock* on this concept of possession and enjoyment was to apply the *Klein* rule that the enlargement of the remainder estate did effect a transmission from the dead to the living.

Assuming that Congress might have legislated so that the added words would apply to the estates of all who died after the passage of the Joint Resolution, Congress definitely manifested an intention that the amendments were not to apply to trusts created prior to the Resolution though the settlor might die subsequently thereto. This whole matter is discussed thoroughly and, I think, unanswerably in *Hassett* v. *Welch,* 303 U. S. 303, and I can add nothing to the argument. Attention, however,

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[9] Why "possession or enjoyment of . . . the property" was put in the amendment to the section I do not know. It reads as if Congress intended to make it clear that the possession or enjoyment of the property was a basis for taxation. Such result would have followed from the original language. That is probably why no cases have been called to our attention that have turned on the use of these words in the amendment.

should be called to the statements on the floor of the House by members of the Committee on Ways and Means at the time of the passage of the Joint Resolution.[10] Mr. Hawley, Chairman of the Committee, answering a question as to the nature of the Resolution said, "It provides that hereafter no such method shall be used to evade the tax."

Mr. Garner of the same Committee stated:

> "The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it. But I do hope that when this matter is considered in the Seventy-second Congress we may be able to pass a bill that will make it retroactive."

And in answer to a question, he reiterated, "I have strong hopes that the next Congress will make it retroactive." Congress never took any subsequent action and this Court's interpretation of the meaning of "intended to take effect in possession or enjoyment" remained the same. The addition to the section made by the Joint Resolution made certain future gifts *inter vivos,* which would theretofore have been free of estate tax, subject to such a tax.

C. As a corollary to the foregoing section B, it is clear to me also that Congress by the Joint Resolution made no change in the statute for the purpose of bringing trusts into an estate merely because the actual use of the estate or its income by the *cestui que trust* was postponed until the death of the donor. *Shukert* v. *Allen, supra.*

D. It is impossible for me to look upon the Spiegel or Church trust as closely akin to a will. The decisive

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[10] 74 Cong. Rec. 7198–99.

difference is that a will may be changed at any time during life, while these trusts obliterated any power in the settlors to change or modify the devolution. Only the chances of death, wholly beyond their control, might put the disposition again in their hands. Further, during life the settlors must handle the trusts for the benefit of all beneficiaries. They were not free to do as they pleased as would have been the case of a will. Of course, if the settlor had made similar provision for the objects of his bounty by will, in effect at death, the result to the takers would have been the same; or if, in the *Spiegel* case, the father had annually given his children the same sums that the trust earned, their economic position would have been the same for that year but the children could not look forward with certainty to their annual income from the trust. Without the trust, the beneficiaries' income would have been subject to the wish of the settlor. It needs no argument or illustration to show that a father's gift from his income is a very different thing from an irrevocable gift of principal to a child.

Returning to the issue in these present cases, the difference between them and *Helvering* v. *Hallock* and its progeny is that here the possibility of reverter arises by operation of law whereas in them the possibility arises out of the terms of the trust. That difference I do not think is material as to taxability under § 810 and § 811 (c). Granting that in early interpretations of the sections this Court might logically have determined that remote possibilities of reverter did not interfere with the beneficiaries' complete possession and enjoyment of the gift during the lifetime of the donor, the balance of experience and precedent, since *Helvering* v. *Hallock*, tips the scale the other way in my judgment. It is important, though not decisive, since we are not justified in pushing every rule to its logical extreme, that this conclusion is a

logical outgrowth of the *Hallock* rule. Since we know it is the purpose of Congress to put an estate tax on gifts intended to take effect at or after death, the interpretation of those words should be broad enough to accomplish the purpose effectually. "Intended to take effect," in that view, has for me the meaning of an intention to abide by the legal result of the terms of the trust.

I recognize that this interpretation has possibilities of variation in result through the employment of technicalities of property law. The addition of a phrase may make the difference between a completed or an incompleted gift. To make the intention of the settlor the determinative factor creates equal difficulties. Nor am I unmindful of this Court's effort, in which I joined, in the *Hallock* case to find a harmonizing principle for the difficulties engendered by § 811 (c). In that case the principle applied was that a tax lies against an estate when the death of the grantor brings a larger estate into being for the beneficiary. This does accomplish uniformity in the interpretation of the section of federal law. *Hallock* attempted nothing more. It leaves its application to particular trusts dependent upon state determination of when a settlor has divested himself of every possible interest in the *res* of a trust.[11] We are

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[11] *Helvering* v. *Stuart*, 317 U. S. 154, 161–62:

"When Congress fixes a tax on the possibility of the revesting of property or the distribution of income, the 'necessary implication,' we think, is that the possibility is to be determined by the state law. Grantees under deeds, wills and trusts, alike, take according to the rule of the state law. The power to transfer or distribute assets of a trust is essentially a matter of local law. . . . Congress has selected an event, that is the receipt or distributions of trust funds by or to a grantor, normally brought about by local law, and has directed a tax to be levied if that event may occur. Whether that event may or may not occur depends upon the interpretation

dealing with a statute and Congress is fully competent to correct any misunderstanding we may have of the congressional intention.

(2) The foregoing leads to the conclusion in the *Spiegel* case that this estate must pay a federal estate tax on the trust *res* unless that *res,* under the law of Illinois, would have passed to the heirs at law or the legatees of the last descendant of the settlor. If under Illinois law the estate returned to the settlor on his surviving all his descendants, the tax is due. The possibilities of this happening in this case are extremely remote but a trust might have been created by a young son for an aged mother to pay her the income for life and at the settlor's death to pay her the principal.

The Court of Appeals concluded (159 F. 2d at 259) that "If none of the beneficiaries survived the settlor, and that was a possibility, then the trust failed, and the trustees would hold the bare naked title to the corpus as resulting trustees for the settlor." There is no Illinois case holding squarely on this point, and in the absence of such a determination by a state court we do not interfere with a reasonable decision of the circuit which embraces Illinois. *Helvering* v. *Stuart,* 317 U. S. 154, 164; *MacGregor* v. *State Mutual Life Assurance Co.,* 315 U. S. 280. The rule followed by the Court of Appeals accords with that generally accepted. Restatement, Trusts § 411; 3 Scott, Trusts § 411; 2 Bogert, Trusts and Trustees § 468; *Harris Trust & Savings Bank* v. *Morse,* 238 Ill. App. 232; *Lill* v. *Brant,* 6 Ill. App. 366, 376.[12]

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placed upon the terms of the instrument by state law. Once rights are obtained by local law, whatever they may be called, these rights are subject to the federal definition of taxability."

[12] The Illinois Annotations to the Restatement of the Law of Trusts, § 411, says that the rule of the Restatement "states the law," but no case has been found where the trustee holds the corpus upon a

The taxpayer relies upon cases wherein the language of wills was construed in order to create vested remainders. These cases, however, do not overturn the firmly settled principle that where an express trust fails for lack of a beneficiary, a resulting trust in favor of the settlor arises by operation of law.[13] To vest property under a will or deed is desirable. To vest property under a trust may not be. It is more reasonable to return trust property to the settlor on failure of the trust than to have it go to the heirs of the beneficiary.

From a reading of the trust instrument involved in the instant case, it is manifest that the settlor did not intend to grant his children the power to dispose of their respective shares should they predecease the settlor with-

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resulting trust for the settlor because of the failure of the *inter vivos* trust. See Restatement, Trusts, Ill. Anno. § 411, comment (b).

In view of the uncertainties surrounding the theory that the burden of proof is on the taxpayer to show that the Commissioner of Internal Revenue is in error as to the law applicable to an assessment of a deficiency, I do not depend upon that theory to support the judgment of the Court of Appeals. See *Helvering* v. *Leonard*, 310 U. S. 80; *Helvering* v. *Fitch*, 309 U. S. 149; cf. *Helvering* v. *Stuart*, 317 U. S. 154, dissent, 172; 2 Paul, Federal Estate and Gift Taxation, § 14.47, n. 4 and 1946 Supp.; 9 Mertens, Law of Federal Income Taxation 285–86.

[13] In *Chater* v. *Carter*, 238 U. S. 572, this Court considered the following language whereby an *inter vivos* trust was created. "The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her." The *cestui que trust* died before the expiration of the three-year period and the question arose as to whether the heir of the *cestui que trust* or the estate of the settlor was to receive the corpus. This Court considered it unnecessary "to strain the meaning of words, as is sometimes done to avoid intestacy when wills are to be construed." It concluded that the trust having failed, the trustee must redeliver the corpus "to him from whom it came. In other words, there is a resulting trust for the donor."

out issue. The settlor specifically named as beneficiaries of the trust his children and grandchildren. That he intended to restrict the trust to these two classes of beneficiaries is evidenced by the provision of the instrument that in the event of the death of a child without issue that child's share was to be added to the shares of the settlor's surviving children. His retention of the trusteeship and failure to grant the power of disposition to his children in his lifetime negative any intention of the settlor to exclude the possibility of a reversion of the trust property to himself.

No error appears in the conclusion of the Court of Appeals on this point.

(3) Finally, the situation in the *Church* case must be dealt with. The trust was created in New York by a resident of New York who died a resident of New Jersey. Two of three trustees were at all times residents of New York where the stocks and accounts of the trust were kept. From what is before me, I would assume that the New York law would control as to the possibility of the retention of an interest by the settlor. This produces a variant from the *Spiegel* case. The determination of New York law will be made by a circuit that does not include that state. This, I think, is not significant in determining the course to be followed.

As the Court of Appeals for the Third Circuit made its decision on the authority of the *Dobson* rule, 161 F. 2d 11, it did not consider the effect of *Hassett* v. *Welch,* 303 U. S. 303. As *May* v. *Heiner* stands, in my opinion, trusts, like the *Church* trust, created prior to the passage of the Joint Resolution of March 3, 1931, are not includable in the gross estate of a settlor for federal estate tax purposes unless there is a possibility of reverter to the settlor by operation of the controlling state law. To determine this question, I would vacate the judgment

of the Third Circuit and remand the case to that court to determine the state law.

I would affirm No. 3, *Spiegel* v. *Commissioner;* I would vacate No. 5, *Commissioner* v. *Church.*

MR. JUSTICE FRANKFURTER, dissenting.*

By fitting together my agreement with portions of the dissenting concurrence and my disagreement with a part of the comprehensive dissenting opinions of my brother BURTON, I could indicate, substantially, my views of these cases. But such piecing together would make a Joseph's coat. Therefore, even at the risk of some repetition of what has been said by others, a self-contained statement on the basic issues of these cases will make for clarity. Particularly is this desirable where disharmony of views supports a common result—a result the upsetting of which by Congress is almost invited.

I.

In the *Spiegel* case, No. 3, the decedent made a settlement by the terms of which he reserved no interest for himself, and it is not suggested that the form of the settlement disguised an attempted evasion of the estate-tax law. The corpus of the decedent's estate is found to be subject to the estate tax on the basis of *Helvering* v. *Hallock,* 309 U. S. 106, as supplemented by *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 324 U. S. 108, *Commissioner* v. *Estate of Field,* 324 U. S. 113, and *Goldstone* v. *United States,* 325 U. S. 687. On that basis it is now decided that if there is a possibility, due to the terms of the instrument or by operation of law, however remote, that settled property may return to the set-

*[This is also a dissent from *Estate of Spiegel* v. *Commissioner, post,* p. 701.]

tlor, the entire trust property must be included in the gross estate for purposes of the federal estate tax. Thus, under the Court's decision tax liability may be incurred by the discovery of a gossamer thread of possession or enjoyment, which has no value. Nevertheless the entire trust corpus is included in the gross estate and taxed as if the settlor really had possession or enjoyment of the property. Such a result not only creates unanticipated hardship for taxpayers; it is also an unrealistic interpretation of § 811 (c) of the Internal Revenue Code. Since such an unrealistic interpretation is not a judicial duty whereas its avoidance is, I am compelled to conclude that Spiegel did not transfer an interest in property "intended to take effect in possession or enjoyment at or after death" within the meaning of § 811 (c) and that the trust corpus settled by him in his lifetime was no part of his gross estate.

This case is brought under the decisions of *Hallock* and the three subsequent cases only by a disregard of the vital differences between the interest created by the Spiegel indenture and the arrangements before this Court in the four cases upon which reliance is placed.

1. In 1920, Spiegel transferred securities to himself and another person as co-trustees, the income to be paid equally to Spiegel's three named children during his lifetime. If any of the children died before the settlor, the share of that child was to go to his issue, if any, otherwise to the settlor's other children. The instrument provided further that upon the settlor's death the corpus, together with any accumulated income, should be divided "equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share" of the trust to which his or her parent would have been entitled.

If any of the settlor's three children died without leaving surviving children, that share was to go to the two remaining children. When the trust was established Spiegel was 47 years old, and his three children were aged 25, 15, and 13. At his death twenty years later the children were still living and there were three grandchildren. Upon the assumption that there would have been a reverter to Spiegel by operation of Illinois law in the event that all his children predeceased him without leaving "surviving children," the value of this remote contingency was determined mathematically to be worth $4,000.[1]

2. In the *Helvering* v. *Hallock* series, *supra,* each of the several donors created a trust giving an estate to another but providing that the property would revert to the donor if the donee predeceased him. The donor's death in each case was the operative fact which established final and complete dominion as between the donor and the donee according to the terms of the instruments. Until the former's death the donor was, as it were, competing with the donee for the ultimate use and enjoyment of the property. We there held that the particular form of conveyancing words is immaterial if the net effect is that transferred property will revest in a donor who survives the donee. Except on a contingency of Illinois law so remote as to be nonexistent in the practical affairs of life, the property would never revert to Spiegel. His death no doubt would finally determine which children or grandchildren would have the ultimate enjoyment of the trust corpus settled upon his children, but in the real world the property could never come back to him as a windfall. His death did not determine contingencies

[1] The Court of Appeals for the Seventh Circuit did not determine whether a grandchild who survived his parent also had to survive the settlor-decedent to have the right to his share of the principal go to his estate.

from which he could benefit. His death merely definitively closed the class of beneficiaries and fixed the quantum of each child's share.

Contrary to the suggestion in the concurring opinion in this case—a suggestion accepted by the majority opinion—the Court of Appeals did not find that Spiegel retained an interest because he had not provided for all contingencies. It included the settled property in the gross estate on the theory that every trust carries as it were the seed of its own destruction through failure of the trust, thereby generating a resulting trust. It said, "If none of the beneficiaries survived the settlor, and that was a possibility, then the trust failed, and the trustees would hold the bare naked title to the corpus as resulting trustees for the settlor." 159 F. 2d at 259. But this mode of argument would have swept into the gross estate a conveyance in trust in fee to any of Spiegel's children in 1920 since the failure of the trust for any conceivable reason presumably would not turn the trust property into an outright gift to the trustees.

The trust indenture is a comprehensive arrangement for the children and their offspring to take care of the contingencies of mortality among the children and their offspring. Provisions such as were made in the *Spiegel* case are precisely the kind of arrangement made by an ancestor for his children and children's children by which he settles property upon them with a view to the contingencies of successive generations and reserves no interest in himself. Nothing was reserved in the settlor except what feudal notions about seisin may have reserved. But feudal notions of seisin are no more pertinent in tax cases when they lead to imposition of an estate tax than when they lead away from it. At the very basis of the decision of the *Hallock* case was the insistence that these "unwitty diversities of the law of property derive[d] from medieval concepts as to the necessity of a continuous

seisin. . . . are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth." *Helvering* v. *Hallock, supra* at p. 118. The metaphysical remoteness of the present settlor's interest at the time the trust was created is clearly shown by the fact that it depended upon the highly unlikely event that all the children in existence at the time of the conveyance would die and would die childless. Even this remote possibility evaporated long before the settlor died. And certainly the only tenable construction of the statute is that not only must there have been a transfer of the sort designated in § 811 (c) but the settlor's interest must also persist up to the time of his death. Cf. *Estate of Miller,* 40 B. T. A. 138; see Griswold, *Cases and Materials on Federal Taxation* 145 (1940).

3. The three later decisions invoked by the Court bear no resemblance to the situation presented by the *Spiegel* case and give no justification for the ruling now made. In *Fidelity-Philadelphia Trust Co.* v. *Rothensies, supra,* the settlement provided for a life estate in the settlor, life estates in the two daughters, and a reversion in the settlor unless the daughters had issue. See Brief for Respondent, p. 8, *Fidelity-Philadelphia Trust Co.* v. *Rothensies, supra; Goldstone* v. *United States,* 325 U. S. 687, 693, n. 3. The birth of the grandchildren which cut off the settlor's interest did not occur until after the death of the settlor. Since, therefore, the taxability is to be determined at death, it followed that the value of the trust property was to be included in the gross estate. The sole controversy was whether deduction should be allowed for the mother's and daughters' life interests and for a contingent gift to unborn children.[2] Likewise in the *Estate of Field* case it was conceded that the settlor retained until death a substantial interest—the right to

[2] The grant of certiorari was "limited to the question of whether the entire value of the corpus of the trust at the time of decedent's

reduce or cancel the interest of life tenants and a reversion of the corpus to himself if he survived these tenants. In the *Estate of Field* case too the controversy concerned the basis on which the estate was to be assessed—whether the value of the life tenancies was to be deducted from the corpus. The *Goldstone* case was in effect another *Hallock* case, the insurance being payable upon the donor's death to the wife but with a reserved right in the donor if she predeceased him.

The birth of grandchildren in Spiegel's lifetime destroys all resemblance between his case and the cases just discussed. On the least favorable reading of the trust instrument—whereby the grandchildren would have to survive not only their parents but also the settlor—the possibility that the settlor would regain the property was extremely tenuous. Reading the trust instrument in a customary and not in a hostile spirit, the grandchildren would merely have to survive their parents and not the settlor for their interest to become indefeasible. Thus the remote contingency of reacquisition by the settlor vanishes.[3]

To be sure, in both the *Fidelity-Philadelphia Trust Co.* and the *Estate of Field* cases there is generality of

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death should have been included in the decedent's gross estate." *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 324 U. S. 108, 110. The same is true in *Commissioner* v. *Estate of Field,* 324 U. S. 113, 114.

[3] In No. 5, *Commissioner* v. *Church,* it is even clearer that events subsequent to the creation of the trust removed whatever possibility of reverter had previously existed even if one assumes that when the trust was created the settlor would regain the property if children or his brothers and sisters did not survive him. The trust indenture provided that the corpus was to go to the issue of deceased brothers and sisters if he survived his brothers and sisters, but there was no requirement that the children survive anyone to take. Unless we are going to import notions of tortious conveyances into modern trust arrangements, the subsequent birth of the children

language about indifference regarding the remoteness or uncertainty of the decedent's "reversionary interest." But in both cases as we have seen there was no question that the trust instrument itself purposely reserved in the settlor an interest which in its context was substantial. The talk of uncertainty and remoteness was merely a way of indicating that where the settlor himself had reserved an interest terminable only by his death, it was not for the law to make nice calculations as to the chance he was giving himself to regain the property. In these two cases the settlor thought the reserved interest had significance and of course the law gave that significance monetary value. Spiegel contrariwise designed to retain nothing and his estate should not be held to include property of which he divested himself many years before his death.

4. But even the gossamer thread which binds the majority together in subjecting the Spiegel trust corpus to an estate tax is visible only to their mind's eye. The gossamer thread is the remote possibility that at the time of Spiegel's death there would be a reverter of the trust property to him. But that possibility depends entirely upon its recognition by the law of Illinois. It is at best a dubious assumption that such a reverter exists under Illinois law. My brother BURTON's argument in disproof is not lightly to be dismissed. At best, however, this Court's guess that Illinois law would enforce such a reverter may be displaced the day after tomorrow by the Illinois Supreme Court's authoritative rejection of the guess. If tax liability is to hang by a gossamer thread, the Court ought to be sure that the thread is there. Since only the courts of Illinois can definitively

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of his brothers and sisters removed any possibility that the property would come back to the settlor. Since I do not reject *May* v. *Heiner*, I do not regard the retention of the life estate as causing the estate to be taxed.

inform us about this, it would seem to me common sense to secure an adjudication from them if some appropriate procedure of Illinois, like the Declaratory Judgment Act, is available.[4] To justify at all the Court's theory, the rational mode of disposing of the case would be to remand it to the Court of Appeals for the Seventh Circuit in order to allow that court to decide whether in fact a procedure is available under Illinois law for a ruling upon the point of Illinois law which is made the basis of this Court's decision, since the correctness of this Court's assumption is at best doubtful. Cf. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483–484; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101. A determination so made would conclusively fix the interests actually held by the parties to the instrument and at the same time leave to the federal courts the tax consequences of these interests. *Blair* v. *Commissioner*, 300 U. S. 5, 9–14; *Freuler* v. *Helvering*, 291 U. S. 35.

II.

The reach of the *Church* case, No. 5, extends far beyond the proper construction of the tax statute.[5] It concerns the appropriate attitude of this Court toward a series of long-standing unanimous decisions by this Court. More than that, it involves the respect owed by this Court to the expressed intention of Congress.

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[4] See Smith-Hurd, Ill. Stat. Ann., Title 110, § 181.1. (Added May 16, 1945.)

[5] The portion of § 811 (c) with which we are now concerned has been continuously on the statute books since 1916, when the first federal estate-tax law was enacted. Revenue Act of 1916, § 202 (b), 39 Stat. 777; Revenue Act of 1918, § 402 (c), 40 Stat. 1097; Revenue Act of 1921, § 402 (c), 42 Stat. 278; Revenue Act of 1924, § 302 (c), 43 Stat. 304; Revenue Act of 1926, § 302 (c), 44 Stat. 70, amended by Joint Resolution of March 3, 1931, 46 Stat. 1516; Revenue Act of 1932, § 803 (a), 47 Stat. 278; Int. Rev. Code § 811 (c).

The short of the matter is this. More than eighteen years ago this Court by a unanimous ruling found that Congress did not mean to subject a trust corpus transferred by a decedent in his lifetime to the estate tax imposed by the Revenue Act of 1918 merely because the settlor had reserved the income to himself for life. *May* v. *Heiner,* 281 U. S. 238. At the earliest opportunity, in three cases having minor variations but presenting the same issue, the Treasury invited the Court's reconsideration of its decision. But the Court, after having had the benefit of comprehensive briefs and arguments by counsel specially competent in fiscal matters, unanimously adhered to its ruling in *May* v. *Heiner. Burnet* v. *Northern Trust Co.,* 283 U. S. 782; *Morsman* v. *Burnet,* 283 U. S. 783; *McCormick* v. *Burnet,* 283 U. S. 784. These decisions, now cast aside, were shared in by judges of whom it must be said without invidiousness that they were most alert in recognizing the public interest and resourceful in protecting it. There were brave men before Agamemnon. If such a series of decisions, viewed in all their circumstances, as that which established the rule in *May* v. *Heiner,* is to have only contemporaneous value, the wisest decisions of the present Court are assured no greater permanence.

In fairness, attention should be called to the fact that in joining the Court's decisions laying down, and adhering to, the *May* v. *Heiner* ruling, Mr. Chief Justice Hughes, Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Stone were not denied argument which the Government has now urged upon us. But it is also fair to the Government to point out that it has not of its own accord asked this Court to overrule the four decisions rendered eighteen years ago. It was only after the case was ordered for reargument and a series of questions was formulated by the Court which shed doubt upon the continued vitality of *May* v. *Heiner,* that the Government

suggested that the decision be cast into limbo. 68 Sup. Ct. 1524. No doubt *stare decisis* is not "a universal, inexorable command." Brandeis, J., dissenting in *Washington* v. *Dawson & Co.*, 264 U. S. 219, 238. But neither is it a doctrine of the dead hand. In the very *Hallock* case relied upon so heavily in these cases the Court said, "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations." 309 U. S. at 119. And one of the most recent reliances on *stare decisis* for decision was expressed with such firmness as to manifest allegiance to principle, not utilization of an *ad hoc* argument.[6] We are not dealing here with a ruling which cramps the power of Government; we are not dealing with a constitutional adjudication which time and experience have proved a parochial instead of a spacious view of the Constitution and which thus calls for self-correction by the Court without waiting

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[6] See *Screws* v. *United States*, 325 U. S. 91, 112–113. "But beyond that is the problem of *stare decisis*. The construction given § 20 in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent reexamination. The meaning which the *Classic* case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 to meet the exigencies of each case coming before us."

for the leaden-footed process of constitutional amendment. We are dealing with an exercise of this Court's duty to construe what Congress has enacted with ample powers on its part quickly and completely to correct misconstruction.

Those powers were promptly invoked in this case. Because the Treasury was dissatisfied with the meaning given by this Court to the estate-tax provision, the very next day after the three decisions reaffirming *May* v. *Heiner* were handed down, the Treasury appealed to Congress for relief and Congress gave relief. The true significance of today's decision in the *Church* case is not to be found in the Court's failure to respect *stare decisis*. The extent to which judges should feel in duty bound not to innovate is a perennial problem, and the pull of the past is different among different judges as it is in the same judge about different aspects of the past. We are obligated, however, to enforce what is within the power of Congress to declare. Inevitable difficulties arise when Congress has not made clear its purpose, but when that purpose is made manifest in a manner that leaves no doubt according to the ordinary meaning of English speech, this Court, in disregarding it, is disregarding the limits of the judicial function which we all profess to observe.

The Treasury no doubt was deeply concerned over the emphatic reaffirmation of *May* v. *Heiner*. The relief sought from Congress was formulated by the fiscal and legal expert who had that very day failed in persuading this Court to overrule *May* v. *Heiner*. What relief did the Treasury seek from Congress? Did the Secretary of the Treasury ask Congress to rewrite § 302 (c) of the Revenue Act of 1926, now § 811 (c) of the Internal Revenue Code, so as to sterilize *May* v. *Heiner*? Certainly not. Not one word was altered of the language of the provision which this Court felt compelled to construe

as it did in *May* v. *Heiner*. What the Treasury proposed and what Congress granted was a qualifying addition to the statute as construed in *May* v. *Heiner* whereby trust settlements reserving a life interest in the settlor were to be included in a decedent's gross estate, but only in the case of settlements made after this qualification became operative, that is, after March 3, 1931. Such, in the light of the legislative history, was the inescapable meaning of what Congress did, and the only thing it did, to qualify the reading which this Court four times felt constrained to place upon the mandate of Congress in the imposition of the estate tax. The history is recounted in *Hassett* v. *Welch*, 303 U. S. 303, again without a dissenting voice. This history is so crucial to the exercise of the judicial process in this case, that it bears repetition.

When the Joint Resolution of March 3, 1931, was adopted, it was clear that it was to be only of prospective effect. Its sponsors specifically declared:

> "Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed." 74 Cong. Rec. 7198 and 7078.

And there was good reason for not making it retroactive:

> "We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it. But I do hope that when this matter is considered in the Seventy-second Congress we may be able to pass a bill that will make it retroactive." 74 Cong. Rec. 7199.

These statements on the floor by those in charge of the Resolution are controlling, as much as though they had been submitted in a Committee Report, for they were the authoritative explanation of the Resolution's purpose and meaning. In fact, Representative Schafer of Wisconsin had stated that unless the sponsors explained the bill he would object, thus preventing its acceptance as a resolution. 74 Cong. Rec. 7198.

When the section was reenacted by the 72d Congress as § 803 (a) of the Revenue Act of 1932, it remained in the pre-*May* v. *Heiner* language with the Joint Resolution of March 3, 1931, added in slightly different phrasing. 47 Stat. 279. This section was interpreted in 1938 by a unanimous Court as not applying to a reserved life estate created in 1924. *Hassett* v. *Welch,* 303 U. S. 303. The briefs filed by the Government in that case again contained much of the same data now found to demand a contrary result.[7] On the same day this Court also decided *Helvering* v. *Bullard,* 303 U. S. 297, which held the Joint Resolution applicable to reserved life estates created after the passage of the Resolution. It quoted the same language from *Matter of Keeney,* 194 N. Y. 281, 287, now quoted by the majority, thus indicating that it appreciated the tax-avoidance problem and would have interpreted § 803 (a) retroactively had Congress indicated that it intended to tax reserved life estates created before March 3, 1931.[8] It

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[7] See Brief for Petitioner, pp. 20 *et seq.,* in *Hassett* v. *Welch,* 303 U. S. 303.

[8] The Court made it clear in *May* v. *Heiner* and the three cases following it that it was resolving a statutory, rather than a constitutional, question. *May* v. *Heiner,* 281 U. S. 238, 244–245; *Burnet* v. *Northern Trust Co.,* 283 U. S. 782, 783; *Morsman* v. *Burnet,* 283 U. S. 783, 783–784; *McCormick* v. *Burnet,* 283 U. S. 784, 784–785. Nor was Congress left in doubt that the Court had merely construed the statute which Congress was then being asked to qualify. In the House, Mr. Black of New York asked, "Was the Supreme

is especially difficult to say that in *Hassett* v. *Welch, supra,* the Court considered only the language added by the Joint Resolution and not the section in its entirety, since it phrased the issue before it in this way:

> "The petitioners ask us to hold that § 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of Congress of March 3, 1931, and § 803 (a) of the Revenue Act of 1932, includes in the gross estate of a decedent, for estate tax, property which, before the adoption of the amendments, was irrevocably transferred with reservation of a life estate to the transferor . . . ." 303 U. S. at 304.

If *May* v. *Heiner* had not been accepted as authoritative, it would have been pointless to decide that the amendment to § 302 (c) of the Revenue Act of 1926 did not operate retroactively. See Learned Hand, J., in *Helvering* v. *Proctor,* 140 F. 2d 87, 89 (C. A. 2d Cir.).

Of course the Government did not attack *May* v. *Heiner* in *Hassett* v. *Welch, supra.* Having been rebuffed three times by this Court in its efforts to secure its overruling and having resorted to Congress to nullify its effect, the whole claim of the Government in *Hassett* v. *Welch* was that Congress had, as it were, overruled *May* v. *Heiner* by the Resolution of March 3, 1931, not only prospectively, but retrospectively. That construction of the Resolution of 1931 had to be rejected in the light of the legislative history of the Resolution. The unanimity of

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Court decision based on a constitutional question, or a discussion of the statute?" To which a sponsor of the legislation, Mr. Garner of Texas, replied, "It was on the statute itself, and was not constitutional." 74 Cong. Rec. 7199. Indeed it is difficult to assume that the Court was affected by notions of constitutionality in view of the fact that when the courts of the State of New York held similar words to apply to a reserved life estate, this Court rejected the contention that the law offended the due process clause of the Fourteenth Amendment. *Keeney* v. *New York,* 222 U. S. 525.

the Court's decision in *Hassett* v. *Welch* confirms the inevitability of the decision. And the considerations that led the Government not to attack *May* v. *Heiner* in *Hassett* v. *Welch* likewise led the Government not to ask the Court to overrule *May* v. *Heiner* in this litigation until propelled to do so by this Court's order for reargument. These considerations were of the same nature, except reenforced by another decade's respect for *May* v. *Heiner* by the Treasury in the actual administration of the revenue law.

Congress has made no change in this section since 1932 and the identical language was carried over as § 811 (c) of the Internal Revenue Code in 1939. There has been no amendment to this language in the Code. Although the sponsors of the Joint Resolution in the House expressed the hope that the next Congress would make the Resolution's provisions retroactive, nothing of the sort was done. See 74 Cong. Rec. 7199, partially quoted *ante* at p. 678. Nor did the Treasury remind any subsequent Congress of this unfinished business, despite the fact that it urged amendment of other provisions of the estate-tax law.[9]

[9] See, *e. g.*, Hearings before Committee on Ways and Means on Revenue Revision, 1932, 72d Cong., 1st Sess. 7, 42–43; Hearings before Committee on Finance on the Revenue Act of 1932, 72d Cong., 1st Sess. 33, 51; 75 Cong. Rec. 5787; Hearings before Committee on Ways and Means on the Revenue Act, 1936, 74th Cong., 2d Sess. 624; Hearings before the Committee on Ways and Means on Revision of Revenue Laws 1938, 75th Cong., 3d Sess. 108; Hearings before the Finance Committee on the Revenue Act of 1938, 75th Cong., 3d Sess. 692–93; Hearings before the Committee on Ways and Means on Revenue Revision of 1941, 77th Cong., 1st Sess. 74–75; Hearings before the Finance Committee on the Revenue Act of 1941, 77th Cong., 1st Sess. 37; Data on Proposed Revenue Bill of 1942 Submitted to the Committee on Ways and Means by the Treasury Department and the Staff of the Joint Committee on Internal Revenue Taxation 363–65 (1942), and Hearings before the Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d

The Court during the past decade, in an impressive body of decisions, has given effect to legislative history under circumstances far less compelling than the story here summarized. See the massive body of cases collected in Appendix A, *post,* p. 687. Moreover, in the face of the legislative history set out above, even an overruling of the five cases in which this precise issue was decided would not give this Court a free hand. For the subsequent actions of Congress make the meaning announced in *May* v. *Heiner* and reaffirmed four times as much a part of the wording of the statute as if it had been written in express terms. See Note, 59 Harv. L. Rev. 1277, 1285. An interpretation that "came like a bombshell" certainly had the attention of the Congress. Its failure to alter the language indicates that it accepted that interpretation. See the cases collected in Appendix B, *post,* p. 690. Due regard for this Court's function precludes it from ignoring explicit legislative intention even to "yield results more consonant with fairness and reason." *Anderson* v. *Wilson,* 289 U. S. 20, 27; see Cardozo, The Nature of the Judicial Process 14 (1921). What the Treasury could not induce the House to do because the Senate would not vote for it we should not now, eighteen years later, bring to pass simply because our action in this case does not depend upon that body's concurrence.

Sess. 7, 91–92, 94; Revised Hearings before the Committee on Ways and Means on Revenue Revision of 1943, 78th Cong., 1st Sess. 7; Revised Hearings before the Finance Committee on the Revenue Act of 1943, 78th Cong., 1st Sess. 46; Federal Estate and Gift Taxes, A Proposal for Integration and for Correlation with the Income Tax, A Joint Study prepared by an Advisory Committee to the Treasury Department and by the Office of the Tax Legislative Counsel, with the cooperation of the Division of Tax Research and the Bureau of Internal Revenue (1948); Letter from the Under Secretary of the Treasury to the Chairman, Committee on Ways and Means, February 26, 1948, pp. 3, 5, 8 (mimeographed copy furnished by the Department of the Treasury).

No comparable legislative history was flouted in *Helvering* v. *Hallock,* 309 U. S. 106. It is one thing to hold that Congress is not charged either with seeking out and reading decisions which reach conflicting views in the application of a sound principle or with taking steps to meet such decisions. This is the meaning of our holding in the *Hallock* case.[10] It is quite a different thing to

[10] The entire text of the *Hallock* opinion insofar as here relevant makes clear why the situation in the *Hallock* case is not at all similar to that involved in the *Church* case.

"Nor does want of specific Congressional repudiations of the *St. Louis Trust* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reëxamining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the *St. Louis Trust* cases it had, even by any bill that found its way into a committee pigeon-hole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such inaction by the Treasury can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring reëxamination by this Court of distinctions which it had drawn. Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

Footnote 7 of the *Hallock* opinion recognized the doctrine of reenactment but stated that it "has no relevance to the present problem" because (1) "the fact of Congressional action in dealing with one problem while silent on the different problems created by the *St. Louis Trust* cases, does not imply controlling acceptance by Congress of those cases"; (2) "since the decisions in the *St. Louis Trust* cases, Congress has not re-enacted § 302 (c)"; (3) there was ". . . no . . . long, uniform administrative construction and subse-

say that a statute does not acquire authoritative content when a decision interpreting it has been called to the attention of the public and of Congress and has engendered professional controversy, and when Congress, after full debate, has not merely refused to undo the effect of the decision but has seen fit to modify it only partially. *Helvering* v. *Griffiths,* 318 U. S. 371; *United States* v. *South Buffalo R. Co.,* 333 U. S. 771, 773–785; cf. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 487–489. That is this case.[11]

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quent re-enactments of an ambiguous statute to give ground for implying legislative adoption of such construction." As indicated in the text of this dissent, the footnote also pointed out that Congress by the Joint Resolution of March 3, 1931, could plausibly be said to have rejected the attitude underlying the *St. Louis Trust* cases. The table in the next note shows just how inapposite are these observations to the story of the Treasury's attempt to undo this Court's ruling in *May* v. *Heiner* and the cases which followed it.

[11] Bearing of legislation subsequent to *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S. 39, compared with that in response to *May* v. *Heiner,* 281 U. S. 238.

Relevant factors	*St. Louis Trust* cases	*May* v. *Heiner* series
1. Age of questioned interpretation when abandoned	Five years	Eighteen years
2. Weight of adjudication		
(a) Court's division	5–4	Unanimous
(b) Times decided	Once	Five times
3. Evidence of Congressional acquiescence	None	(a) The exact holding explained to Congress (b) Change expressly made prospective
4. Apparent reason for Congressional adherence to questioned case	None	Difficulty of getting necessary Senate votes

The opinion of the majority in the *Hallock* case did not, either explicitly or by implication, declare that *May* v. *Heiner* was no longer the accepted interpretation of the pre-1931 part of the language in § 811 (c). When we spoke of what had been "Congressionally discarded"—a reference, incidentally, made to answer the argument that Congress had legislatively recognized the distinction between the *Klein*[12] and the *St. Louis Trust*[13] cases—we meant just what Congress meant, that where a settlor created a trust after May 3, 1931, in which he reserved a life estate, the property transferred would be included in the gross estate. It is significant that only one[14] of the many circuit judges who have dealt with the *Hallock* opinion has thought that it overruled *May* v. *Heiner* or that the interpretation there announced was to be changed. *Commissioner* v. *Hall's Estate,* 153 F. 2d 172 (C. A. 2d Cir.); *Helvering* v. *Proctor,* 140 F. 2d 87 (C. A. 2d Cir.); *Commissioner* v. *Church's Estate,* 161 F. 2d 11 (C. A. 3d Cir.); *United States* v. *Brown,* 134 F. 2d 372 (C. A. 9th Cir.). The contention that the *Hallock* case overruled *May* v. *Heiner* was, one would have supposed, conclusively answered by Judge Learned Hand in *Helvering* v. *Proctor, supra* at pp. 88–89:

> "The opinion of the majority in Helvering v. Hallock, supra, did not explicitly, or by inference from

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[12] *Klein* v. *United States,* 283 U. S. 231.

[13] *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S. 39; *Becker* v. *St. Louis Union Trust Co.,* 296 U. S. 48.

[14] And even the judge who found *May* v. *Heiner* inconsistent with the *Hallock* case suggested that the Tax Court determine whether the grantor failed to relinquish his life estate in reliance on *May* v. *Heiner.* See Frank, J., dissenting in *Commissioner* v. *Hall's Estate,* 153 F. 2d 172, 174, 175 (C. A. 2d Cir.). The Government at the bar of this Court suggested that hardships could be alleviated by a regulation relieving of a tax those estates which could show such reliance. The very suggestion involves a confession that the decision urged upon the Court would be unfair.

anything said, declare that May v. Heiner, supra . . . was no longer law. We do not forget that in a note on page 120 of 309 U. S. . . . Frankfurter, J., spoke of the 'Congressionally discarded May v. Heiner doctrine;' but it would be quite unwarranted from that to infer that the court meant to overrule that 'doctrine,' and the note was added for quite another purpose. . . . it cannot properly be interpreted as holding that the amendment was a legislative interpretation that May v. Heiner, supra, had been wrongly decided. Perhaps it was wrongly decided; perhaps the amendment is evidence that it was; but the Supreme Court did not say so, or indicate that it thought so. It is true that Roberts, J. in his dissent found no difference (309 U. S. at page 127 . . .) between that decision and Helvering v. St. Louis Union Trust Co., supra, 296 U. S. 39 . . . and apparently thought that consistently, May v. Heiner, supra, must also fall, but the majority did not share his opinion.

"Helvering v. Hallock, supra, 309 U. S. 106 . . . was concerned with quite another situation. The settlor had provided that, if he survived his wife—who had a life estate—the remainder went to him; but if she survived him, the remainder went to her. All that was decided was that, when that was the intent, it made no difference what was the form of words used. It was enough that the settlor's death cut off an interest which he had reserved to himself upon a condition then determined; that made the remainder a part of his estate. . . . If therefore May v. Heiner, supra, 281 U. S. 238 . . . is to be overruled, we do not see how Helvering v. Hallock, supra, can be thought to contribute to that result; it must be overruled by a new and altogether

> independent lift of power, which it is clearly not ours to exercise. Furthermore, if the Commissioner is right, Helvering v. Hallock, supra, 309 U. S. 106 . . . also overruled Hassett v. Welch, 303 U. S. 303 . . . sub silentio. That decision had held that the amendment to § 302 (c) did not operate retroactively; and it would not have been necessary to discuss that question, nor would the actual result have been the same, if May v. Heiner, supra, 281 U. S. 238 . . . had not been law."

I would reverse *Spiegel* v. *Commissioner,* No. 3, and affirm *Commissioner* v. *Estate of Church,* No. 5.

APPENDIX A

DECISIONS DURING THE PAST DECADE IN WHICH LEGISLATIVE HISTORY WAS DECISIVE OF CONSTRUCTION OF A PARTICULAR STATUTORY PROVISION

United States v. *Durkee Famous Foods, Inc.,* 306 U. S. 68; *United States* v. *Towery,* 306 U. S. 324; *Kessler* v. *Strecker,* 307 U. S. 22; *United States* v. *Maher,* 307 U. S. 148; *United States* v. *One 1936 Model Ford,* 307 U. S. 219; *Sanford* v. *Commissioner,* 308 U. S. 39; *Palmer* v. *Massachusetts,* 308 U. S. 79; *Valvoline Oil Co.* v. *United States,* 308 U. S. 141; *Haggar Co.* v. *Helvering,* 308 U. S. 389; *American Federation of Labor* v. *Labor Board,* 308 U. S. 401; *Kalb* v. *Feuerstein,* 308 U. S. 433; *Morgan* v. *Commissioner,* 309 U. S. 78; *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251; *Amalgamated Utility Workers* v. *Consolidated Edison Co. of New York,* 309 U. S. 261; *Germantown Trust Co.* v. *Commissioner,* 309 U. S. 304; *Sheldon* v. *Metro-Goldwyn Pictures Corp.,* 309 U. S. 390; *United States* v. *City and County of San Francisco,* 310 U. S. 16; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *United States* v. *American Trucking Assns.,* 310 U. S. 534; *United States* v. *Dickerson,* 310 U. S. 554; *Helvering* v. *Northwest Steel Rolling Mills, Inc.,* 311 U. S. 46; *Neuberger* v. *Commissioner,* 311 U. S. 83; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products,* 311 U. S. 91; *Helvering* v. *Janney,* 311 U. S. 189; *Taft* v. *Helvering,* 311 U. S. 195; *Hines* v. *Davidowitz,* 312 U. S. 52; *United States* v. *Gilliland,*

312 U. S. 86; *Palmer* v. *Webster & Atlas National Bank*, 312 U. S. 156; *United States* v. *Cooper Corp.*, 312 U. S. 600; *Helvering* v. *Enright*, 312 U. S. 636; *Maguire* v. *Commissioner*, 313 U. S. 1; *Helvering* v. *Campbell*, 313 U. S. 15; *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177; *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U. S. 247; *Sampayo* v. *Bank of Nova Scotia*, 313 U. S. 270; *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326; *Gray* v. *Powell*, 314 U. S. 402; *District of Columbia* v. *Murphy*, 314 U. S. 441; *Illinois Natural Gas Co.* v. *Central Illinois Public Service*, 314 U. S. 498; *Duncan* v. *Thompson*, 315 U. S. 1; *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357; *United States* v. *Local 807 of International Brotherhood of Teamsters*, 315 U. S. 521; *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561; *Labor Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685; *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698; *United States to the use of Noland Co.* v. *Irwin*, 316 U. S. 23; *Mishawaka Rubber & Woolen Manufacturing Co.* v. *S. S. Kresge Co.*, 316 U. S. 203; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Helvering* v. *Cement Investors, Inc.*, 316 U. S. 527; *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78; *Braverman* v. *United States*, 317 U. S. 49; *Riggs* v. *Del Drago*, 317 U. S. 95; *Ex parte Kumezo Kawato*, 317 U. S. 69; *State Bank of Hardinsburg* v. *Brown*, 317 U. S. 135; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144; *United States* v. *Wayne Pump Co.*, 317 U. S. 200; *Parker* v. *Brown*, 317 U. S. 341; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476; *United States* v. *Hess*, 317 U. S. 537; *United States* v. *Monia*, 317 U. S. 424; *Ziffrin, Inc.* v. *United States*, 318 U. S. 73; *Palmer* v. *Hoffman*, 318 U. S. 109; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Robinette* v. *Helvering*, 318 U. S. 184; *Smith* v. *Shaughnessy*, 318 U. S. 176; *Helvering* v. *Sabine Transp. Co.*, 318 U. S. 306; *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218; *United States* v. *Swift & Co.*, 318 U. S. 442; *Ecker* v. *Western Pac. R. Co.*, 318 U. S. 448; *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643; *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61; *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Boone* v. *Lightner*, 319 U. S. 561; *Schneiderman* v. *United States*, 320 U. S. 118; *Hirabayashi* v. *United States*, 320 U. S. 81; *Roberts* v. *United States*, 320 U. S. 264; *United States* v. *Dotterweich*, 320 U. S. 277; *Crescent Express Lines* v. *United States*,

320 U. S. 401; *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U. S. 422; *United States* v. *Laudani*, 320 U. S. 543; *United States* v. *Myers*, 320 U. S. 561; *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50; *B. F. Goodrich Co.* v. *United States*, 321 U. S. 126; *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144; *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634; *Labor Board* v. *Hearst Publications*, 322 U. S. 111; *Carolene Products Co.* v. *United States*, 323 U. S. 18; *Smith* v. *Davis*, 323 U. S. 111; *United States* v. *Rosenwasser*, 323 U. S. 360; *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386; *Central States Electric Co.* v. *City of Muscatine*, 324 U. S. 138; *Gemsco* v. *Walling*, 324 U. S. 244; *Canadian Aviator* v. *United States*, 324 U. S. 215; *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515; *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490; *Brooklyn Sav. Bank* v. *O'Neil*, 324 U. S. 697; *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746; *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers of America*, 325 U. S. 161; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60; *Markham* v. *Cabell*, 326 U. S. 404; *John Kelley Co.* v. *Commissioner*, 326 U. S. 521; *Roland Electrical Co.* v. *Walling*, 326 U. S. 657; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178; *Duggan* v. *Sansberry*, 327 U. S. 499; *United States* v. *Carbone*, 327 U. S. 633; *Williams* v. *United States*, 327 U. S. 711; *Federal Trade Commission* v. *A. P. W. Paper Co.*, 328 U. S. 193; *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707; *United States* v. *Sheridan*, 329 U. S. 379; *Oklahoma* v. *United States Civil Service Commission*, 330 U. S. 127; *United States* v. *United Mine Workers of America*, 330 U. S. 258; *United Brotherhood of Carpenters & Joiners of America* v. *United States*, 330 U. S. 395; *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567; *United States* v. *Ogilvie Hardware Co.*, 330 U. S. 709; *McCullough* v. *Kammerer Corp.*, 331 U. S. 96; *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132; *Williams* v. *Austrian*, 331 U. S. 642; *Jones* v. *Liberty Glass Co.*, 332 U. S. 524; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6; *Hilton* v. *Sullivan*, 334 U. S. 323; *United States* v. *National City Lines*, 334 U. S. 573; *United States* v. *Zazove*, 334 U. S. 602; *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106; *Shapiro* v. *United States*, 335 U. S. 1; *Ahrens* v. *Clark*, 335 U. S. 188.

APPENDIX B

OPINIONS DURING THE PAST DECADE RESTING UPON THE RULE THAT THE REENACTMENT OF A STATUTE CARRIES GLOSS OF CONSTRUCTION PLACED UPON IT BY THIS COURT

Electric Storage Battery Co. v. *Shimadzu*, 307 U. S. 5, 14; *Rasquin* v. *Humphreys*, 308 U. S. 54; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469; *Brooks* v. *Dewar*, 313 U. S. 354; *Helvering* v. *Griffiths*, 318 U. S. 371; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17; *Commissioner* v. *Munter*, 331 U. S. 210; *Francis* v. *Southern Pacific Co.*, 333 U. S. 445; *United States* v. *South Buffalo R. Co.*, 333 U. S. 771; cf. *Federal Communications Comm'n* v. *Columbia Broadcasting System of California*, 311 U. S. 132, 132–133; see MR. JUSTICE BLACK dissenting in *Washingtonian Publishing Co.* v. *Pearson*, 306 U. S. 30, 42; see Mr. Chief Justice Stone dissenting in *Girouard* v. *United States*, 328 U. S. 61, 70.

MR. JUSTICE BURTON, dissenting.

Except for its important reservation to the settlor of a right to the net income of the trust during the settlor's life, the deed of trust in this case [1] is largely comparable to the trust instrument in the *Spiegel* case, 335 U. S. 701.

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[1] This Indenture made the 17th day of May, 1924, between Francois L. Church, of the Borough of Brooklyn, City and State of New York (hereinafter sometimes called the "Settlor"), party of the first part, and Francois L. Church and E. Dwight Church, of the Borough of Brooklyn, city and State of New York, and Charles T. Church, of New Rochelle, New York (hereinafter sometimes called the "Trustees"), parties of the second part.

Whereas the said Francois L. Church is desirous of making provision for any lawful issue which he may leave at the time of his death as well as provide an income for himself for life in the manner hereinafter set forth,

Now, therefore, the said Francois L. Church, in consideration of the sum of One Dollar to him in hand paid, the receipt whereof is hereby acknowledged, and the acceptance by said parties of the second part of the trust herein declared, has simultaneously with the execution and delivery hereof, sold, assigned, transferred and set over and does hereby sell, assign, transfer and set over unto the

Both speak for themselves as complete transfers *in praesenti.* Neither was made in contemplation of death.

The evidence of the factual intent of this settlor, likewise, is comparable to that of the settlor in the *Spiegel*

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said Francois L. Church, E. Dwight Church and Charles T. Church as Trustees, and to their successors, the following securities, to wit:

One thousand (1000) shares of stock of Church & Dwight Co., a corporation organized under the laws of Maine,

To have and to hold the same, together with the moneys and investments into which in the exercise of any power hereinafter given to the trustees or by law vested in them, the said described securities or the proceeds thereof and such moneys may from time to time be converted in trust nevertheless to hold, manage, invest and reinvest the said trust estate upon the trust herein contained and with the powers herein or by law conferred upon the trustees, and to collect and receive the income accruing therefrom and after paying from said income all charges and expenses properly chargeable against the income of said trust estate to pay over the net income to the Settlor, Francois L. Church, during the term of his natural life and upon the death of the Settlor this trust shall cease and determine and the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate, with all increase thereof as it shall then exist, to the child or children of the Settlor then surviving the issue of any deceased child or children to take the share per stirpes which their parent would have been entitled to receive if living.

In the event that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have been entitled to receive if living.

The Trustees with respect to such trust are hereby authorized and empowered:

(1) To retain the trust estate during the continuance of the trust in the same investment in which it was received by them without being liable to account for any resulting loss;

(2) To sell at public or private sale upon such terms and for such price or prices and at such time or times and together or in such lots or parcels as the Trustees may think proper the securities

case. In fact, the affirmative evidence that the settlor intended to make a transfer complete and absolute *in praesenti* is stronger here than in the *Spiegel* case. This settlor avowedly sought to protect not only his family

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held by them in the trust, but no such sale or sales shall be made by the trustees without the consent first obtained of the Settlor;

Likewise in the event of a sale the proceeds of such sale shall be reinvested by the trustees without unnecessary delay in securities approved by the Settlor or in default of such approval in securities authorized for investment by Trustees by the laws of the State of New York;

(3) To compromise any claim or claims that may at any time arise with reference to the trust estate or any property or security forming a part thereof;

(4) To exchange any of the trust securities for other securities in connection with any reorganization of Church & Dwight Company or any other company or companies issuing securities then belonging to the trust;

(5) To vote upon stock, directly or by proxy, in any manner and to the same extent as if the trustees held the shares in their own right, including the power to vote in favor of consolidating or merging corporations into or with each other or into or with other corporations, for the dissolution or liquidation of corporations, the creating or authorization of indebtedness, mortgages and other liens and for the organization or reorganization of corporations and to deposit securities with any reorganization committee or protection committee of any corporation.

(6) To apportion in their uncontrolled discretion as between income and principal as the trustees may deem proper, any losses or profits resulting from the increase or decrease in the value of the securities or property which may at any time form a part of the trust estate, and also so to apportion the income of the trust estate, and any loss in said income and any proceeds received upon account of income, whether by way of interest, dividends, stock dividends or by way of the distribution of cash, bonds, debentures, stocks or other securities by corporations whose stocks or securities may at any time form a part of the principal of the trust estate or otherwise, and also similarly to apportion expenses incurred in the administration of said trust or in connection with the realization upon any of said securities or property;

(7) To employ counsel or attorneys at law in connection with

but also himself against the possibility of his further disposal of his interest in the corpus of the trust. The remoteness of any possibility of a reverter, arising by operation of law, is comparable here to the remoteness of the alleged possibility of a reverter in the *Spiegel* case. Two other features of this case, however, require separate consideration.

First. It is the law of New York that must determine here whether the possibility of a reverter, either to the settlor or to his estate, arose by operation of law from the deed of trust. As this case came up from New Jersey, in the Third Circuit, we have no announcement of the law of New York from the United States Court of Appeals for the Second Circuit which includes New York. Furthermore, when the United States Court of Appeals for the Third Circuit rendered its judgment in favor of the taxpayer, it did so in express reliance upon the opinion of the Tax Court and the Tax Court, in turn, did not elucidate the law of New York.

While I rest my conclusion in favor of affirmance upon the absence of the factual intent which, as stated in my dissent in the *Spiegel* case, I believe is required by

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the administration of the trust if in their discretion the Trustees deem it necessary or desirable and to pay them reasonable compensation for their services as an expense of the administration of said trust.

In the event that any of the Trustees should resign or for any other reason cease to be a trustee such vacancy shall be filled by the appointment of a successor trustee in writing by the Settlor.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

FRANCOIS L. CHURCH,
Settlor.

FRANCOIS L. CHURCH,
E. DWIGHT CHURCH,
CHARLES T. CHURCH,
Trustees.

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§ 811 (c) of the Internal Revenue Code, a substantial argument might be made for affirmance on the ground that, under the law of New York, no possibility of a reverter arose from this trust by operation of law.[2] A substantial argument might also be made for affirmance on the ground that the alleged possibility of a reverter, here and also in the *Spiegel* case, should be disregarded on the doctrine of *de minimis non curat lex.*

Second. In the opinion of the Court in the instant case, the judgment below is reversed, however, without facing any of the above grounds for its affirmance. This is done by overruling *May* v. *Heiner,* 281 U. S. 238, and that action has carried with it the foundation for this Court's opinion in *Hassett* v. *Welch,* 303 U. S. 303. The effect of such reversal is to place this trust, which was executed in 1924, in the same position as though it had been executed after the Joint Resolution of March 3, 1931, 46 Stat. 1516–1517. That Resolution made the federal estate tax applicable to property transferred *thereafter* by any deed of trust that reserved to the transferor a right to the possession or enjoyment of or the income from the trust property during his life. There is no doubt but that the transfer in the instant case would have been subject to the estate tax if the deed of trust had been executed after, instead of before, the Resolution of March 3, 1931. The legislative history of that Resolution demonstrates, however, that it was not intended to be retroactive. Its prospective character also carried

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[2] The respondent cites particularly *Fulton Trust Co.* v. *Phillips,* 218 N. Y. 573, 581, 113 N. E. 558, 559; and *Matter of Bowers,* 195 App. Div. 548, 186 N. Y. S. 912, aff'd, 231 N. Y. 613, 132 N. E. 910; and, as presenting analogous situations in testamentary trusts or dispositions, *Matter of Elting,* 268 App. Div. 74, 48 N. Y. S. 2d 892, aff'd, 294 N. Y. 941, 63 N. E. 2d 123; *Matter of McCombs,* 261 App. Div. 449, 25 N. Y. S. 2d 894, aff'd, 287 N. Y. 557, 38 N. E. 2d 226.

with it at least a congressional recognition of the existence of some basis for making a distinction between prior and future transfers of the type described.

After the execution of the instant trust in 1924—and certainly between March 3, 1931 and the death of the settlor on December 11, 1939—there was little, if any, reason for him to consider making further disposition of his reserved rights in order to protect his estate from the federal estate tax. Between 1924 and 1939, there were handed down by this Court its decisions in *May* v. *Heiner, supra,* on April 14, 1930; *Morsman* v. *Burnet,* 283 U. S. 783, and its two companion cases, on March 2, 1931; and *Hassett* v. *Welch, supra,* on February 28, 1938. In those of the above decisions which were rendered before March 3, 1931, this Court unanimously and unequivocally held that the federal estate tax was not to be applied to a trust merely because of the retention thereunder of a right in the settlor to receive the income of the trust during his life. The entry made by this Court in each of the companion cases decided March 2, 1931, expressly stated a doubt as to the constitutional authority of Congress to enact a law which would apply the estate tax retroactively to transfers that already had been made. The action of Congress on March 3, 1931, reflected that doubt. The seven Justices who participated in the case of *Hassett* v. *Welch, supra,* in 1938, refrained from expressing doubt as to the state of the law before March 3, 1931. In that case the Court reviewed carefully the legislative history that was material to the case and also the administrative interpretation which had been given to the statute. The Court concluded as follows (at pp. 314–315):

> "In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively; that, if doubt exists as to the

construction of a taxing statute, the doubt should be resolved in favor of the taxpayer, we feel bound to hold that the Joint Resolution of 1931 and § 803 (a) of the Act of 1932 apply only to transfers with reservation of life income made subsequent to the dates of their adoption respectively.

"Holding this view, we need not consider the contention that the statutes as applied to the transfers under consideration deprive the respondents of their property without due process in violation of the Fifth Amendment."

Thus, up to the time of the settlor's death in 1939, he never was given reason, at least by this Court, to suspect that the property which he had included in his 1924 deed of trust would be added to his gross estate for federal estate tax purposes.[3]

The issue as originally presented in *May* v. *Heiner* was solely one of statutory interpretation and there were persuasive arguments for deciding the case either way. However, the unanimous decision of this Court in that case changed the status of that issue. Thereafter, the statute carried the meaning ascribed to it by this Court.

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[3] It appears in the record that the settlor, in 1924, relied upon the advice of his family attorney and, assuming the continuance of such a relationship, such attorney in subsequent consultations may well have counseled the settlor's further policy in express reliance upon *May* v. *Heiner*, 281 U. S. 238. With comparable situations evidently in mind, it has been suggested, in opinions which recently have considered the possibility of overruling *May* v. *Heiner, supra,* that no judgment overruling that case should be rendered by this Court without remanding the case to the District Court to ascertain whether or not the parties had in fact placed reliance upon the authority of that case and making special provision to avoid an unfair result if such reliance were found in fact to have existed. See dissenting opinions in *Helvering* v. *Proctor,* 140 F. 2d 87, 91 (C. A. 2d Cir.); and *Commissioner* v. *Hall's Estate,* 153 F. 2d 172, 175 (C. A. 2d Cir.).

Such an acceptance of the effect of *May* v. *Heiner* was expressly stated in the three *per curiam* companion decisions of March 2, 1931. This acceptance also has been evidenced in some degree by the failure of Congress, at any time, to set forth a contrary view on its part as to the meaning of its original language. Congress merely added new language to change the effect of that interpretation for the future. The Treasury Department conformed its regulations and practices to the reasoning of *May* v. *Heiner*. This Court further acceded to this view in 1938 in *Hassett* v. *Welch* and in the companion case of *Helvering* v. *Marshall*, 303 U. S. 303, when it affirmed the respective lower court judgments in those cases. The lower courts had held that certain pre-1931 comparable trusts, executed in 1920 and 1924, were not subject to the federal estate tax.[4] Today, with ten addi-

[4] The discussion in the opinion in *Hassett* v. *Welch*, *supra*, was limited to the claimed effect of the 1931 and 1932 Amendments. This Court's judgment in that case and in *Helvering* v. *Marshall*, *supra*, however, affirmed the judgments of the respective Courts of Appeals for the First and Second Circuits. (In *Welch* v. *Hassett*, 90 F. 2d 833 (C. A. 1st Cir.), the Court of Appeals discussed and relied upon *McCormick* v. *Burnet*, 283 U. S. 784, *Morsman* v. *Burnet*, 283 U. S. 783, *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, *May* v. *Heiner*, *supra*, and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. In *Commissioner* v. *Marshall*, 91 F. 2d 1010 (C. A. 2d Cir.), the Court of Appeals relied primarily upon the *Welch* decision in the First Circuit.) Those respective Courts of Appeals accordingly had held that the 1931 and 1932 Amendments were inapplicable to a trust which was executed in 1924 (and reaffirmed in 1926) by a settlor who died in 1932, and to another which was executed in 1920 by a settlor who died in 1933. They also held that, under § 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 70, the Commissioner could not lawfully require the trusteed property to be included for federal estate tax purposes in the gross estates of the respective settlor-decedents. This Court's affirmance of those judgments was, therefore, a confirmation of its original holding that, before the 1931 and 1932 Amendments, this statute did not render trust

tional years of administrative practice in conformity with it, the rule of *May* v. *Heiner* should be substantially less subject to reversal than in 1938. The doctrine of *stare decisis,* with full recognition of its appropriate limitations as expressed in *Helvering* v. *Hallock,* 309 U. S. 106, 119–122, weighs strongly against a reversal of *May* v. *Heiner* now. The problem presented here is just such a one as was said not to exist in the *Hallock* case. The problem here is one of rejecting a settled statutory construction. This Court's reversal of the *May* v. *Heiner* construction of the estate tax statute as to pre-March 3, 1931 trusts does retroactively, in 1948, what this Court and Congress respectively declined to attempt in 1931. Since 1931, countless taxpayers doubtless have relied upon and benefited by the interpretation announced in *May* v. *Heiner*. They had no more right to such benefits than has the taxpayer in this case. If the Government, after this reversal, issues regulations to relieve, in all fairness, settlors who, in demonstrated reliance upon the decisions of this Court and upon the practice of the Treasury Department, have not disposed of their reserved rights under pre-March 3, 1931 trusts like the present one, such special regulations will further emphasize the unique unfairness of enforcing the present decision against the taxpayer in the instant case.

By reversing *May* v. *Heiner* this Court repudiates the finality of its 1930 and 1931 decisions interpreting the

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property subject to the federal estate tax merely because the settlor in transferring the property to his trustees had reserved for himself a right to the income of that property during his life and had provided for the distribution of the corpus of the trust at his death in the manner stated in those cases. The prospective language of the 1931 and 1932 Amendments left the meaning of the statute unchanged as to trusts executed before March 3, 1931. It is that unchanged meaning which is applicable in the instant case.

pre-1931 legislation. It holds that the statutory interpretation then announced by this Court of final resort is not final, except as to the parties to the respective cases in which the original judgments are *res judicata.* After reliance by the Judicial, Legislative and Executive branches of the Government for 18 years upon this authoritative statutory construction, a reversal of it can be justified only by extraordinary circumstances. I fail to find such circumstances, either in the merits of the decision, in the nature of the issue or in the relative importance to the general public of a reversal as against an affirmance of the original interpretation of this tax statute. The statutory interpretation established in *May* v. *Heiner* has a peculiarly limited application because its interpretation of the statute in relation to future trusts was cut off on March 3, 1931. Passage of time will soon eliminate transfers made prior to that date by settlors who are yet to die or who have died and whose estates may still be forced to include such transfers for federal estate tax purposes. The 1931 legislation plus the passage of time would thus have disposed of *May* v. *Heiner* without the injustices that will now arise from its reversal.

Value is added to the fully considered decisions of this Court by our own respect for them. Faith is justifiable that this Court will exercise extreme self-restraint in using its power of self-reversal. While that power is essential in appropriate cases and is an inherent part of this Court's finality of jurisdiction, each case that suggests its use should be scrutinized with the utmost care. In the instant case I find arguments to suggest and support, but not to require, a construction of the statute contrary to that originally given in *May* v. *Heiner.* I find nothing sufficient to justify the reversal of this Court's original construction 18 years after this Court approved it unanimously and 17 years after this Court unanimously reaf-

firmed that approval. Likewise, I find nothing in the intervening decisions of this Court that forces this reversal upon us.[5] For these reasons, I believe that the judgment of the Court of Appeals should be affirmed on the authority of *May* v. *Heiner* and *Hassett* v. *Welch*, and upon the principles stated in my dissent in the *Spiegel* case, *post*, p. 708.

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[5] The status of *May* v. *Heiner* has been mentioned by this Court from time to time without calling forth any repudiation of its authority by a majority of the Court. See *Helvering* v. *Hallock*, 309 U. S. 106, 120, n. 7, and dissenting opinions at 123, 126 *et seq.*; *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108, concurring opinion at 113. The effect upon it of the *Hallock* case has been considered many times by federal courts with a resulting adherence to both cases. "The opinion of the majority in Helvering v. Hallock, supra, did not explicitly, or by inference from anything said, declare that May v. Heiner, supra, . . . was no longer law." Circuit Judge L. Hand in *Helvering* v. *Proctor*, 140 F. 2d 87, 88 (C. A. 2d Cir.). See also, *Commissioner* v. *Hall's Estate*, 153 F. 2d 172 (C. A. 2d Cir.); *Commissioner* v. *Singer's Estate*, 161 F. 2d 15 (C. A. 2d Cir.); *Commissioner* v. *Kellogg*, 119 F. 2d 54 (C. A. 3d Cir.); *Schultz* v. *United States*, 140 F. 2d 945 (C. A. 8th Cir.); *United States* v. *Brown*, 134 F. 2d 372 (C. A. 9th Cir.); *New York Trust Co.* v. *United States*, 100 Ct. Cl. 311, 51 F. Supp. 733; *Estate of Matthews*, 3 T. C. 525. While these decisions are not binding upon this Court as precedents, they are decisions which those courts properly reached in determining the binding force, upon them, of our decisions in *May* v. *Heiner* and *Helvering* v. *Hallock*. They have an appropriate bearing upon the exercise of our discretion to overrule *May* v. *Heiner* at this late date.

ESTATE OF SPIEGEL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 3. Argued October 24, 1947.—Reargued October 11–12, 1948.—Decided January 17, 1949.

In 1920 decedent, a resident of Illinois, made a transfer in trust of certain stocks to himself and another. He died in 1940. During his life the trust income was to be divided among his three children; if they did not survive him, to any of their surviving children. On his death the corpus was to be distributed in the same manner. But no provision was made for distribution of the corpus and its accumulated income should the decedent survive all of his children and grandchildren. The Tax Court determined that the value of the corpus of the trust was not includible in the gross estate of the decedent under § 811 (c) of the Internal Revenue Code. The Court of Appeals for the Seventh Circuit reversed, holding that under Illinois law there was a possibility of reverter to the decedent and that this made the corpus of the trust includible in his gross estate under § 811 (c). *Held:*

1. This Court accepts the determination of the Court of Appeals that under Illinois law the settlor had a right of reverter; this renders the trust one "intended to take effect in possession or enjoyment at or after his death," within the meaning of § 811 (c) of the Internal Revenue Code; and the value of the corpus of the trust at the settlor's death was includible in his gross estate for purposes of the federal estate tax. Pp. 705–707.

(a) The taxability of a trust corpus under the "possession or enjoyment" provision of § 811 (c) does not hinge on a settlor's motives, but depends on the nature and operative effect of the trust transfer. P. 705.

(b) A trust transaction cannot be held to alienate all of a settlor's "possession or enjoyment" under § 811 (c) unless it effects a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title, and no right to possess

or to enjoy the property then or thereafter. *Commissioner* v. *Estate of Church, ante,* p. 632. P. 705.

(c) It is immaterial whether a present or future interest, absolute or contingent, remains in the settlor because he deliberately reserves it or because, without considering the consequences, he conveys away less than all of his property ownership and attributes, present or prospective. P. 705.

(d) The Tax Court having found that the trust contained no provision for disposition of the corpus should the settlor outlive the beneficiaries, and petitioner not having contended that it was denied an opportunity to present any relevant evidence concerning ownership, possession, or enjoyment, remand of the case to the Tax Court for further findings of fact is unnecessary. Pp. 706–707.

2. The fact that the monetary value of the settlor's contingent reversionary interest is small in comparison with the total value of the corpus does not render the "possession or enjoyment" provision of § 811 (c) inapplicable. P. 707.

3. The ruling of the Court of Appeals for the Seventh Circuit, which circuit embraces Illinois, that under Illinois law when all trust beneficiaries die the trust corpus reverts to the donor, is not plainly wrong and this Court does not disturb it. Pp. 707–708.

159 F. 2d 257, affirmed.

The Commissioner determined that the corpus and certain accumulated income of the trust in question was includible in the gross estate of the decedent for purposes of the federal estate tax. The Tax Court reversed. The Court of Appeals reversed. 159 F. 2d 257. This Court granted certiorari. 331 U. S. 798. *Affirmed,* p. 708.

Herbert A. Friedlich argued the cause for petitioners. With him on the briefs were *Leo F. Tierney, Harry Thom* and *Louis A. Kohn.* *Joseph M. Weil* was also on the brief on the reargument.

Arnold Raum argued the cause for respondent. With him on the briefs were *Solicitor General Perlman, Assistant Attorney General Caudle, Lee A. Jackson* and *L. W. Post.* *Helen R. Carloss* was also on the brief on the original argument, and *Ellis N. Slack* was also on the brief on the reargument.

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a federal estate tax controversy. Here, as in *Commissioner* v. *Church, ante,* p. 632, we granted certiorari to consider questions dependent upon the meaning and application of a provision of § 811 (c) of the Internal Revenue Code. 47 Stat. 169, 279, as amended, 26 U. S. C. § 811 (c). The particular provision requires including in a decedent's gross estate the value at his death of all property "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise . . . intended to take effect in possession or enjoyment at or after his death . . . ."

In 1920 Sidney M. Spiegel, a resident of Illinois, made a transfer by trust of certain stocks to himself and another. He died in 1940. During his life the trust income was to be divided among his three children; if they did not survive him, to any of their surviving children. On his death the trust provided that the corpus was to be distributed in the same manner. But no provision was made for distribution of the corpus and its accumulated income should Mr. Spiegel survive all of his children and grandchildren. For this reason the Government has contended that under controlling state law the property would have reverted to Mr. Spiegel had he survived his designated beneficiaries.

The value of the corpus of this trust was not included in the Spiegel estate tax return. The Commissioner concluded that its value with accumulated income, about $1,140,000, should have been included in the gross estate under § 811 (c). The Tax Court held otherwise in an unreported opinion. The Court of Appeals for the Seventh Circuit reversed. 159 F. 2d 257. It held that the possession or enjoyment provision of § 811 (c) required inclusion of the value of the trust property and accumulated income under the rule declared in *Helvering* v. *Hallock,* 309 U. S. 106, because under state law the trust

agreement left the way open for the property to revert to Mr. Spiegel in case he outlived all the beneficiaries. This holding rested on the agreement of parties that whether there was a right of reverter depended on Illinois law, and the court's conclusion that under Illinois law a right of reverter did exist.[1]

The *Hallock* case on which the Court of Appeals relied held that the value of trust properties should have been included in a settlor's gross estate under the "possession or enjoyment" provision where trust agreements had expressly provided that the corpus should revert to the settlor in the event he outlived the beneficiaries. The taxpayer has contended here, as in the Tax Court and the Court of Appeals, that the *Hallock* rule is not applicable to this trust, where the settlor's chance to get back his property depended on state law and not on an express reservation by the settlor. This contention of the taxpayer rests in part on the argument that § 811 (c) imposes a tax only where it can be shown that the settlor's intent was to reserve for himself a contingent reversionary interest in the property. Another contention is that the value of this contingent reversionary interest was so small in comparison with the total value of the corpus that the *Hallock* rule should not be applied. A third contention is that the Court of Appeals holding was erroneous in that under Illinois law the corpus of this trust would not have reverted to the settlor had all the beneficiaries died while the settlor was still living. Petitioners urge that in that event the Illinois courts would have held that the corpus passed to the heirs of the last surviving beneficiary.

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[1] This Court of Appeals interpretation and application of § 811 (c) was in conflict with the holding of the Third Circuit in *Commissioner of Internal Revenue* v. *Church's Estate*, 161 F. 2d 11. We granted certiorari in both cases, arguments have been heard together, and we have today reversed the *Church* case, *ante*, p. 632.

We hold that the *Hallock* rule was rightly applied by the Court of Appeals and we accept its holding as to the applicable Illinois law.

First. In *Commissioner* v. *Church, ante,* p. 632, we have discussed the *Hallock* holding in relation to the scope of the "possession or enjoyment" provision of § 811 (c) and need not elaborate what we said there. What we said demonstrates that the taxability of a trust corpus under this provision of § 811 (c) does not hinge on a settlor's motives, but depends on the nature and operative effect of the trust transfer. In the *Church* case we stated that a trust transaction cannot be held to alienate all of a settlor's "possession or enjoyment" under § 811 (c) unless it effects "a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title, and no right to possess or to enjoy the property then or thereafter. In other words such a transfer must be immediate and out and out, and must be unaffected by whether the grantor lives or dies." We add to that statement, if it can be conceived of as an addition, that it is immaterial whether such a present or future interest, absolute or contingent, remains in the grantor because he deliberately reserves it or because, without considering the consequences, he conveys away less than all of his property ownership and attributes, present or prospective. In either event the settlor has not parted with all of his presently existing or future contingent interests in the property transferred. He has therefore not made that "complete" kind of trust transfer that § 811 (c) commands as a prerequisite to a showing that he has certainly and irrevocably parted with his "possession or enjoyment." Any requirement

less than that which we have outlined, such as a post-death attempt to probe the settlor's thoughts in regard to the transfer, would partially impair the effectiveness of the "possession or enjoyment" provision as an instrument to frustrate estate tax evasions. To this extent it would defeat the precise purpose for which the provision was originated and which prompted Congress to include it in § 811 (c).

Determination of such issues as ownership, possession, enjoyment, whether transfers have been made and the reach of those transfers, may involve many questions of fact. And we have held in many cases that to the extent the determination of such issues depends upon fact finding, many different facts may be relevant. These fact issues in federal tax cases are for the Tax Court to decide in cases brought before it.

In this case the Tax Court made findings of fact and then decided against the Government. It did so, however, by holding as a matter of law that those facts did not require inclusion of the value of this corpus in the settlor's estate.[2] But the Tax Court's findings of fact showed that the trust contained no provision for disposition of the corpus should the settlor outlive the beneficiaries. This finding of fact, which we accept, plus the Court of Appeals determination of controlling Illinois law,

[2] The Tax Court's conclusion of law that the "possession or enjoyment" clause of § 811 (c) was inapplicable to the facts of this trust rested in part on its belief that *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, had decided the issue. But the *Hallock* case was decided after *Reinecke*, and the question here involved was not specifically raised in the *Reinecke* case. Nor did the Court's opinion in that case, written by the late Chief Justice Stone, indicate that a transfer of bare legal title in a transfer must always be accepted as a conclusive showing that the possession and enjoyment provision of § 811 (c) cannot be applied to the trust corpus. *Cf.* Court's opinion in *Harrison* v. *Schaffner*, 312 U. S. 579, written by Chief Justice Stone.

without more, brings this trust transaction within the scope of the possession or enjoyment provision of § 811(c) as we have interpreted that section in the *Hallock* and *Church* cases. And petitioner has not contended that it was denied an opportunity to present any relevant evidence concerning ownership, possession, or enjoyment. It is therefore not necessary to remand the case to the Tax Court for any further finding of facts. See *Hormel* v. *Helvering,* 312 U. S. 552, 559–560.

Second. It is contended that since the monetary value of the settlor's contingent reversionary interest is small in comparison with the total value of the corpus, the possession or enjoyment provision of § 811 (c) should not be applied. But inclusion of a trust corpus under that provision is not dependent upon the value of the reversionary interest. *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 324 U. S. 108, 112; *Commissioner* v. *Estate of Field,* 324 U. S. 113, 116; see *Goldstone* v. *United States,* 325 U. S. 687, 691. The question is not how much is the value of a reservation, but whether after a trust transfer, considered by Congress to be a potentially dangerous tax evasion transaction, some present or contingent right or interest in the property still remains in the settlor so that full and complete title, possession or enjoyment does not absolutely pass to the beneficiaries until at or after the settlor's death. See *Smith* v. *Shaughnessy,* 318 U. S. 176, 181.

Third. It is contended that under Illinois law the corpus of this trust would not have reverted to the settlor had he outlived the beneficiaries. The record reveals that the state law problem here is not an easy one, but under this Court's decision in *Meredith* v. *Winter Haven,* 320 U. S. 228, the difficulty involved did not relieve the Court of Appeals of its duty to make a decision. The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One

of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law.[3]

All other arguments of the petitioners have been noted and we find them without merit.

Affirmed.

MR. JUSTICE JACKSON dissents.

[For opinion of MR. JUSTICE REED, concurring in this decision but dissenting from that in *Commissioner* v. *Estate of Church, ante,* p. 632, see *ante,* p. 651.]

[For opinion of MR. JUSTICE FRANKFURTER, dissenting from this decision and also that in *Commissioner* v. *Estate of Church, ante,* p. 632, see *ante,* p. 667.]

MR. JUSTICE BURTON, dissenting.

Today's decision adds to the difficulties in this troubled field of estate tax law. It may, however, serve a good purpose if it leads to a simultaneous consideration by

[3] *Helvering* v. *Stuart,* 317 U. S. 154, 162–165; *cf. Steele* v. *General Mills,* 329 U. S. 433.

Congress of the related fields of income, gift and estate taxation in connection with the creation or transfer of future interests.

FIVE ALTERNATIVES.

At least five alternative proposals have been presented to us for the solution of this case. The *first* calls for the reversal of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, and a decision against the taxpayers. The *second* calls for the extension to this case of the doctrine of *Helvering* v. *Clifford*, 309 U. S. 331, and a remand to determine further facts. The *third*, *fourth* and *fifth* follow existing precedents more closely. Each recognizes that, if no possibility of a reverter[1] arose in favor of the settlor, by operation of law, under the trust instrument before us, the property thereby placed in trust is not required by § 811 (c) of the Internal Revenue Code to be included in the gross estate of the settlor for federal estate tax purposes. The *third* proposal finds that the law to be applied, for the above purpose, is that of Illinois. It calls for a decision in favor of the taxpayers because, under a correct application of that law, the required

[1] The terms "reverter" and "the possibility of a reverter" have been used frequently and freely in opinions and discussions of this general subject. They are used here to refer to the return or possible return to the settlor or to his estate, under conditions comparable to those here suggested, of property previously placed in trust by the settlor. They are not used in any strict or technical sense peculiar to the law of property. See also, I Paul, Federal Estate and Gift Taxation § 7.21, n. 1 (1942). They may refer, for example, to a reversionary interest, or a beneficial interest under a resulting trust, or merely some right to or control over a beneficial interest in the trust property and, in that sense, they include the "string or tie" to the trust property that also has been referred to frequently in discussions of this subject. The term "reversion" is used in its usual technical meaning in the law of property.

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reverter could not arise. The *fourth* proposal claims or assumes that a possibility of a reverter did arise under this trust by operation of the law of Illinois in favor of the settlor. It, however, declines to apply the rule of *de minimis non curat lex* and, by declining to look further, it reaches a decision against the taxpayers. This is the alternative which has been adopted in the opinion of the Court. The *fifth* proposal is like the fourth except that it does look further and it recognizes that § 811 (c) requires a finding of the settlor's actual intent in order to make that Section applicable. It then concludes that in the instant case the required intent is absent. The fifth proposal, therefore, calls for a decision in favor of the taxpayers or at least calls for a remand to determine the existence, if any, of the settlor's required intent. I believe that only the third and fifth proposals present a sound solution. Each of those two is founded upon existing precedents, reaches an equitable result and contributes to the certainty rather than to the uncertainty of the application of the tax, pending legislative reconsideration of the entire subject. I prefer the fifth because it avoids complete dependence upon the law of a state. If the fifth proposal is not accepted, I believe that the present status of the law of Illinois requires acceptance of the third.

I. THE FIRST PROPOSAL IS THAT THE REINECKE CASE BE OVERRULED.

The lack of judicial support for overruling *Reinecke* v. *Northern Trust Co., supra,* at this late day, makes it unnecessary to consider this proposal at length. It has been, however, strongly urged upon us. The Spiegel trust instrument is so simple and complete in its terms [2] that to apply the federal estate tax to its corpus merely on the strength of those terms would require a reversal

[2] The Spiegel trust instrument is set forth in full in Appendix I, *infra,* p. 735.

of the *Reinecke* case. Accordingly, on the reargument of this case, we asked the following question:

> "1. Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, *inter vivos,* did section 811 (c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate-tax purposes? That is, did section 811 (c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust, created *inter vivos,* merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving?" Journal Supreme Court, Oct. Term, 1947, pp. 296–297.

In response, counsel for the Commissioner argued in the affirmative and counsel for the petitioners in the negative. The interpretation of the statute urged on behalf of the Commissioner, however, had been long ago rejected unanimously by this Court in passing upon the so-called "five trusts" in the *Reinecke* case. Accordingly, if that precedent stands, the answer to the above question remains "No" and that issue should be at rest.

The reasoning of the *Reinecke* case requires that, for a transfer to be taxable in a case like this, the settlor must have intended that the transfer come *from the settlor* and that it take effect in possession or enjoyment at or after the settlor's death. It must be from the dead to the living. That requirement calls for the existence of an interest, right or control in the settlor, or at least the existence of some possibility of a reverter to the settlor or to his estate, amounting to a string or tie to the trust property, in order to make § 811 (c) applicable. Such interest, string or tie must also be one that was

transferred, cut off or obliterated by the terms of the trust at or after the death of the settlor.

Accordingly, there now should be said about § 811 of the Internal Revenue Code, 53 Stat. 120, 26 U. S. C. (1940 ed.) § 811, what Mr. Justice Stone, in 1929, said in the *Reinecke* case about the corresponding § 402 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278:

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50; *Edwards* v. *Slocum,* 264 U. S. 61, 62; *N. Y. Trust Co.* v. *Eisner,* 256 U. S. 345, 349. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute." *Id.* at pp. 347–348.

See also, *Helvering* v. *Hallock,* 309 U. S. 106; dissenting opinion in *Becker* v. *St. Louis Union Trust Co.,* 296 U. S. 48, 53, and *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S. 39, 46; *Klein* v. *United States,* 283 U. S. 231; and *Shukert* v. *Allen,* 273 U. S. 545.

II. THE SECOND PROPOSAL IS FOR THE APPLICATION OF THE DOCTRINE OF THE CLIFFORD CASE.

To apply the doctrine of *Helvering* v. *Clifford, supra,* to the case before us is, in effect, to substitute that doc-

trine for the doctrine of the *Reinecke* case. Heretofore, this Court has made no application of the doctrine of the *Clifford* case to § 811 (c) or to any of its predecessor Sections. That doctrine has been reserved largely for income tax cases. All the facts appropriate for a decision in this case under the doctrine of the *Clifford* case have not been presented. The absence of those facts from the record and the absence of this issue from the arguments made below emphasize the inappropriateness of a remand to introduce such facts at this late point in this proceeding. Nothing suggests that this trustee has practiced fraud, or tax evasion, or has violated his obligations as a trustee. The trust became irrevocable at its inception. It thus contrasts sharply with any testamentary instrument which the settlor might have executed. There is nothing in it to suggest that the settlor, even as a sole surviving trustee, would be free from strict accountability to the beneficiaries of the trust or from an obligation to use his discretion in their interest rather than in his own. There is no more of an express provision in this trust for the possibility of a reverter to the settlor than there was in the *Reinecke* case. The countless uncertainties which would arise in other cases from a retroactive application to this statute of the doctrine of the *Clifford* case might be nearly as great as those which would flow from a reversal of the *Reinecke* case.

Furthermore, there is a sharp contrast between § 22 (a)[3] and § 811 (c) of the Internal Revenue Code as a starting point for the application of the doctrine of the *Clifford* case. Section 22 (a), upon which the *Clifford*

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[3] "SEC. 22. GROSS INCOME.

"(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership

case rests its expansion of the traditionally taxable income of the taxpayer, invites or at least permits the broad interpretation given to it. Section 811, on the other hand, contains no sweeping inclusions. Whatever breadth of language it contains is in § 811 (a), whereas § 811 (c) is in the nature of a special exception from the broad field of transfers *inter vivos*. Section 811 (c) seeks to apply the estate tax to certain identifiable classifications of such transfers where experience has indicated that, in spite of their form, Congress believes they should be subjected to estate tax. The historical development of § 811 (c) bears out this interpretation. It has been extended only by the addition of specifically described classifications. The same is true of the revocable transfers described in § 811 (d), of joint and community interests in § 811 (e), of powers of appointment in § 811 (f), of proceeds of life insurance in § 811 (g), of transfers of prior interests in § 811 (h) and of transfers for insufficient consideration in § 811 (i). If Congress had intended to sweep into the gross estate of the decedent broad classifications of transfers *inter vivos*, contrary to the limitations upheld in *Reinecke* v. *Northern Trust Co., supra,* or as would result from the application of the doctrine of *Helvering* v. *Clifford,* many of the foregoing specific extensions would not have been necessary. The very specificity of the terms of § 811 (c) and of its related subsections emphatically negative any broad interpretation of their language. No language of a breadth comparable to that used in § 22 (a) appears anywhere in the Section.

To apply the doctrine of the *Clifford* case to the Spiegel trust because of the powers which the Spiegel trust vested

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or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ." 53 Stat. 9, 26 U. S. C. (1940 ed.) § 22 (a).

in the settlor as a trustee conflicts with the position taken by this Court as to the "five trusts" in the *Reinecke* case, *supra*. For example, the powers reserved directly to the settlor under Trust No. 4477 in the *Reinecke* case not only are equal to but, in some ways, are broader than those vested in the settlor, as a trustee, in the Spiegel trust. The very fact that in Trust No. 4477 the reservations were made directly to the settlor in his personal capacity, rather than to him as a trustee, removes from them the traditional limitations which equity places upon a trustee in the exercise of powers which he holds for the benefit of his *cestui que trust*. In Appendix II, *infra*, p. 737, Trust No. 4477 is quoted in full from the record in the *Reinecke* case and a number of the especially material clauses have been italicized. While the terms of that trust were not quoted verbatim in the opinion of this Court in the *Reinecke* case, this Court there summarized several of them [4] and said:

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus

[4] ". . . The settlor reserved to himself power to supervise the reinvestment of trust funds, to require the trustee to execute proxies to his nominee, to vote any shares of stock held by the trustee, to control all leases executed by the trustee, and to appoint successor trustees. With respect to each of these five trusts a power was also reserved 'to alter, change or modify the trust,' which was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of one of the trusts, by the settlor and a majority of the beneficiaries named, acting jointly." 278 U. S. at p. 344.

> complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax." (At pp. 346–347.)

This Court thus showed that all of the powers reserved directly to the settlor, even if coupled with the "others" of the trustee, would not subject that trust to the estate tax. This is especially significant because the issue now presented had been brought squarely before this Court in the *Reinecke* case by the following question in the Government's brief:

> "1. Do the words of Section 402 (c) of the Revenue Act of 1921, which provide that, for the purpose of measuring the estate tax, there shall be included in the value of decedent's gross estate trusts intended to 'take effect in possession or enjoyment at or after his death,' embrace:
>
> . . . . .
>
> "(*b*) Trusts created after the effective date of a similar and earlier Act, where the settlor reserved the power to sell and reinvest the trust property; vote the stock; control leases; reappoint trustees; and, jointly with the beneficiaries, to alter, amend, or modify the trust. (This applies to Trusts Nos. 4477, 4478, 4479, 4480, and 4481, respectively, appearing in the record at pp. 3, 17, 25, 32, 40.)" [5]

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[5] Upon the reargument of the instant case and the *Church* case, we requested counsel to discuss particularly nine questions insofar as those questions were relevant to the respective cases. The first question has been quoted *supra* at p. 711. The rest are quoted below and, of these, numbers 2, 6, 8 and 9 bore upon this alternative solution:

"2. Assuming that, under the applicable state law, there arose,

For us to hold that § 811 (c) applies here because of the powers which have been vested in the settlor-trustee under the Spiegel trust would, therefore, amount to over-

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by operation of law, a possible reverter in favor of the settlor's estate, did section 811 (c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate-tax purposes?

"3. Did section 811 (c) of the Internal Revenue Code, in 1939, require the inclusion in the settlor's gross estate of the value of the corpus of a trust because the settlor, by its terms, had, in 1924, reserved to himself a right to the income of the trust until his death, the reservation thus being made before the March 3, 1931, amendment of that section?

"4. Were the joint congressional resolution of 1931 (46 Stat. 1516–1517), and subsequent related estate-tax statutes, intended to be a repudiation of this Court's May *v.* Heiner (281 U. S. 238) interpretation of the estate-tax statutes?

"5. Did the May *v.* Heiner estate-tax interpretation survive the congressional resolution and this Court's holding and opinion in Helvering *v.* Hallock (309 U. S. 106)?

"6. Under section 811 (c) is the 'possession and enjoyment' of the corpus of an *inter vivos* trust 'intended to take effect * * * at or after' the settlor's death, where he names himself as cotrustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?

"7. In the light of this Court's opinion in Helvering *v.* Hallock does the Hassett *v.* Welch (303 U. S. 303) interpretation of the 1931 congressional resolution have controlling relevance in determining whether the estate tax shall be applied to the Church properties transferred to beneficiaries under a trust created before 1931 but in which Church retained the net income from the trust properties during his life?

"8. Assuming that under the 'refined technicalities of the law of property' the 'possession and enjoyment' of the trust properties here be deemed to have passed to the beneficiaries when the trust was created, are the transfers so much 'akin to testamentary dispositions' as to make them subject to the estate-tax statutes? (See Helvering *v.* Hallock, p. 112.)

"9. What is the effect of the rulings of Helvering *v.* Clifford (309 U. S. 331) upon these trusts?" Journal Supreme Court, Oct. Term, 1947, pp. 297–298.

ruling the decision of this Court in the *Reinecke* case which held that the corresponding language of § 402 (c) of the Revenue Act of 1921 did not apply in that case.[6]

The failure to remand this case for the determination of further facts which would be material under the tests of the *Clifford* case does not settle the question that has been argued as to the application of those tests under § 811 (c). It does, however, show that this Court has not been willing to rest its decision upon the application of the doctrine of the *Clifford* case on the basis of the terms of this trust and of the facts shown by the present record.

COMMON BASIS FOR THE THIRD, FOURTH AND FIFTH PROPOSALS.

THE MATERIAL FACTS.

The important facts in this case are the terms of the trust instrument and the intent of the settlor. The terms of the instrument are those to which the law of Illinois must be applied to determine whether there arose, by op-

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[6] A somewhat comparable but less direct conflict is presented by *Goldstone* v. *United States,* 325 U. S. 687. There substantially complete control over the disposition of the proceeds of insurance contracts was placed by the insured in the discretion of his wife, who also was the primary beneficiary. A minority of this Court sought to apply the doctrines of the *Hallock* case and the rationale which inheres in the *Clifford* case to the extent of recognizing the transaction as, in substance, a completed gift to the wife of the insured, and therefore not subject to the estate tax. This Court, however, did not, in that case, apply the Clifford doctrine to the estate tax. But see *Richardson* v. *Commissioner,* 121 F. 2d 1 (C. A. 2d Cir.), cert. denied, 314 U. S. 684, where it was held that, under the *Clifford* case, a trustee, with a broad power of revocation which might at any time be exercised for his own benefit, was himself liable for the income tax on the income of the trust. See also, *Bunting* v. *Commissioner,* 164 F. 2d 443 (C. A. 6th Cir.), cert. denied, 333 U. S. 856; 47 Mich. L. Rev. 137 (1948).

eration of law, any possibility of a reverter in favor of the settlor which might have been transferred, cut off or obliterated by the settlor's death. In 1920 the settlor made an irrevocable transfer, in Illinois, by trust, of certain corporate securities with directions to the trustees to pay the income of the trust, during the life of the settlor, to his three named children, but, if any of such children predeceased the settlor, the payments were to go to the children of such deceased child or children *per stirpes*. If there were no surviving child of a deceased child of the settlor, the payments were to go to the other children of the settlor and to their descendants *per stirpes*. Similarly, upon the settlor's death, the trust fund and any accumulated income thereon were to be divided among the settlor's three children. It was provided, with obvious care, that, if any of the settlor's children had by that time died, leaving any child or children surviving, then the child or children of such deceased child of the settlor was or were to receive the share of the trust fund to which its or their parent would have been entitled. Furthermore, if any of the settlor's three children died without leaving any child or children surviving, then the share of such deceased child was to go to the settlor's remaining children and to the descendants of any deceased child of the settlor *per stirpes*. No further express provision was made for the disposition of the income or of the corpus of the trust in the event, for example, that none of the settlor's three children and no descendants of such children survived the settlor. The instrument contained no further intimation of any intent or even thought on the part of the settlor that in any manner there might arise in favor of the settlor or of his estate, any beneficial interest, or right to, or control over the possession or enjoyment of the income or corpus of the trust.

The gift was not made in contemplation of death. At that date there was no law prescribing a federal gift

tax applicable to it. The trustees named in the trust were the settlor himself and one other person whose relationship, if any, to the settlor does not appear in the record. Both were residents of Illinois. Their powers of management were comparable to those commonly granted to trustees to handle a trust estate consisting originally of such securities as were transferred here. The trust mentioned no power of appointment and no power to alter, amend, revoke or terminate the trust. At the creation of the trust, the age of the settlor was 47 and he was a widower. His three only children were, respectively, about 22, 15 and 12 years old. He then had no grandchildren. In 1940, when he died, he was 68 and his children were, respectively, 43, 36 and 33. He then had three grandchildren, aged, respectively, ten, four and two. Throughout his life the income of the trust was distributed to and for the benefit of his three children and upon his death the entire fund was distributed equally among them.

THE POSSIBILITY OF A REVERTER TO THE SETTLOR.

In addition to his broader claims discussed under the first and second proposals, the Commissioner has presented a narrow claim. This is a claim that if, by operation of law, there arises from the trust a reversionary interest in the settlor or in his estate, or if there exists even a gossamer thread of a possibility of a reverter to the settlor or to his estate, and if such interest, "string or tie" were, by the terms of the trust, to be transferred, cut off or obliterated by his death, then, under existing precedents, the entire trust property should be included in the gross estate of the settlor for federal estate tax purposes. There is no issue made here as to the amount of the tax if any is due. The petitioners' claim is simply that no estate tax is applicable to the trust fund.

III. The Third Proposal.

ILLINOIS LAW PRECLUDES THE POSSIBILITY OF A REVERTER.

On this branch of the case the first inquiry must be as to the law of Illinois and the second as to its application to this trust. A determination of the Illinois law and of its application adversely to the taxpayers would be conclusive against them, unless relieved by the rule of *de minimis* under the fourth proposal, or by a finding favorable to them on the issue of the settlor's factual intent under the fifth proposal. On the other hand, a finding favorable to the taxpayers upon either the principle or the application of the law of Illinois would dispose of this case in their favor. This very conclusiveness of the state law under this proposal is a weighty consideration in favor of the interpretation of the statute presented by the fifth proposal. A federal policy of complete dependence upon state laws for the application of any nationwide tax cannot fairly be attributed to Congress without a much clearer expression of such a policy than appears in § 811 (c). The inherent difficulty of administration and the resulting inequality of taxation as between instruments governed by the laws of different states argue strongly against such a policy.

This Court, as a settled practice, places much reliance upon announcements by Courts of Appeals as to the law of the states within their respective Circuits.[7] The weight to which such announcements are entitled will vary with the circumstances under which they are made. In this case we have an announcement by the Court of Appeals for the Seventh Circuit on the law of Illinois as to the effect of contingent remainders contained in

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[7] See *Helvering* v. *Stuart,* 317 U. S. 154, 163–164; *MacGregor* v. *State Mutual Co.,* 315 U. S. 280.

a trust and pointing out that, under the law of Illinois, they create reversionary interests in the settlor. Our difficulty here is not with the law as thus stated but with the application made of it to this case. The trouble is that the trust in this case contains not contingent remainders but vested remainders, and it is clear that, under the law of Illinois, no reversions, reversionary interests, resulting trusts or "possibilities of a reverter" of any kind can arise by operation of law from a vested remainder. This is due to the essential difference between a contingent remainder and a vested remainder. If the law of Illinois is to control the situation, there is no escape from the determination of this clear-cut issue under the law of that State.

The failure of a condition precedent upon which a contingent remainder depends under a trust results naturally enough in a reversion of the undisposed-of beneficial interest to the settlor of the trust. On the other hand, the failure of a condition subsequent attached to a vested remainder under a trust results equally naturally only in a failure of the divestiture contemplated by the condition. The effect of such a failure of a condition subsequent attached to a vested remainder is not a reversion of an undisposed-of beneficial interest to the settlor of the trust. It merely relieves the holder of the vested remainder and his legatees and next of kin from the possibility of the divestiture to which the remainder originally had been subjected.

The Court of Appeals in the instant case has made no announcement of Illinois law contrary to that just stated. In fact, it made no announcement whatever on the subject of vested remainders because it treated the Spiegel remainders as contingent.[8] The foregoing ele-

[8] "Applying this law to the instant case, we think it follows that the interests under this trust did not vest upon the execution of the

mental statement as to the legal effect of contingent remainders and of vested remainders subject to conditions subsequent conforms to the generally accepted law of trusts [9] and to the law of Illinois.[10]

This brings us near to the decisive question whether the remainder interests written into the Spiegel trust were contingent or vested. The Commissioner has suggested that it makes little substantial difference whether a condition is a condition precedent or a condition subsequent, as long as it is a condition. That is so for many purposes but where, as here, a tax, by hypothesis, can

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trust, as contended by the taxpayer, and could only vest upon the happening of the condition precedent, namely, that the beneficiaries or some of them survive the settlor, and this was the 'event which brought the larger estate into being for the' beneficiaries." *Commissioner* v. *Spiegel's Estate*, 159 F. 2d 257, 259.

[9] "Where property is given in trust for one beneficiary for life and to another beneficiary in remainder, and before the termination of the trust the latter beneficiary dies intestate and without heirs or next of kin, it would seem that his interest passes to the state, and that a resulting trust will not arise in favor of the settlor or his estate. In such a case, since the entire beneficial interest, subject to the preceding life estate in the other beneficiary, vested in the beneficiary entitled in remainder absolutely at the time of the creation of the trust, it would seem that the trust does not fail on his death, so as to give rise to a resulting trust, but his interest passes to the state as *ultimus haeres*. On the other hand, if the beneficial gift over is contingent, and the contingency does not occur, a resulting trust will arise in favor of the settlor or his estate." 3 Scott On Trusts, § 411.5 (1939).

[10] The Illinois cases establish the rule that, when a vested estate in remainder has been created, the divestment of that estate in favor of some other beneficiary can take place only in literal compliance with the divesting conditions set forth by the settlor. *Henderson* v. *Harness*, 176 Ill. 302, 52 N. E. 68. See *Illinois Land Co.* v. *Bonner*, 75 Ill. 315; *McFarland* v. *McFarland*, 177 Ill. 208, 217, 52 N. E. 281, 284; and *Continental Illinois Nat. Bank* v. *Kane*, 308 Ill. App. 110, 31 N. E. 2d 351. See also, 42 Ill. L. Rev. 561, 564. This does not leave room for reversion to the settlor by operation of law.

attach only if some possibility of a reverter can arise in favor of the settlor before his death, then it is inescapably necessary to determine whether or not, by operation of the law of Illinois, such a possibility of a reverter can arise under this trust. To say in such a situation that the language of the conveyance makes no difference is to beg the question. The possibility is not expressly spelled out or denied. Its existence, like the existence of any other beneficial interest in the trust, must depend upon the effect given by Illinois law to the words of art in the conveyance. In the last analysis the problem is to determine whether or not the settlor intended by his language that the possession and enjoyment of his property were to return to him upon failure of the express dispositions of the beneficial interests in it. If the settlor had wished to express himself in detail he could have done so. Here, however, he used only the customary language of conveyancing and it remains to see what effect the Illinois law gives to that language.

In the helpful light of *Lachenmyer* v. *Gehlbach,* 266 Ill. 11, 107 N. E. 202, the remainders in the Spiegel trust are shown to be vested remainders, carrying conditions subsequent. See also, *Stombaugh* v. *Morey,* 388 Ill. 392, 58 N. E. 2d 545; *Murphy* v. *Westhoff,* 386 Ill. 136, 53 N. E. 2d 931; *Danz* v. *Danz,* 373 Ill. 482, 26 N. E. 2d 872; *Smith* v. *Shepard,* 370 Ill. 491, 19 N. E. 2d 368; *Hoblit* v. *Howser,* 338 Ill. 328, 170 N. E. 257; *Boye* v. *Boye,* 300 Ill. 508, 133 N. E. 382; *McBride* v. *Clemons,* 294 Ill. 251, 128 N. E. 383; *Hickox* v. *Klaholt,* 291 Ill. 544, 126 N. E. 166; *Welch* v. *Crowe,* 278 Ill. 244, 115 N. E. 859. Cf. *Freudenstein* v. *Braden,* 397 Ill. 29, 72 N. E. 2d 832. No distinction has been drawn in the Illinois cases between interests created by *inter vivos* deeds and like interests created by testamentary documents. See *Smith* v. *Dugger,* 310 Ill. 624, 625, 142 N. E.

243, 244, where the Illinois Supreme Court relied upon *Lachenmyer* v. *Gehlbach, supra,* in construing an *inter vivos* deed. See also, *Harder* v. *Matthews,* 309 Ill. 548, 141 N. E. 442.[11]

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[11] The basis of distinction necessarily rests with the form of the statement employed. A classic definition of the distinction between contingent and vested remainders is that in Gray, The Rule Against Perpetuities, § 108, quoted as follows in *Lachenmyer* v. *Gehlbach,* 266 Ill. 11, 18–19, 107 N. E. 202, 205:

"A test which is generally regarded as sufficient to determine the question and which has been generally adopted is stated as follows: 'If the conditional element is incorporated into the description of or into the gift to the remainder-man then the remainder is contingent, but if, after words giving a vested interest, a clause is added divesting it the remainder is vested. Thus, on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent.' "

The language in the Spiegel and the Lachenmyer trusts is closely comparable. In each case the gift to children of the settlor is a vested gift. In the Spiegel trust the children's interest was a vested primary interest (subject to conditions subsequent) and in the Lachenmyer trust the children's interest was a vested remainder following a life interest in favor of the testator's wife (and in turn subject to conditions subsequent). In both cases the language making the gifts over is in the form of a divestiture—comparable to that in the classic example quoted above "*but if any child dies in the lifetime of A* his share to go to those who survive, ..." (Italics supplied.)

The material provision of the Spiegel trust, italics supplied, is as follows:

"3. Upon my death, the said Trustees, and the survivor of them, or any successor Trustee, shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, *equally among my said three (3) children, and if any of my said children shall have died,* leaving any child or children surviving, *then* the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled,

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For these reasons, by operation of the law of Illinois, there here existed no possibility of a reverter to the settlor and, therefore, the federal estate tax cannot attach to it. To the extent that the Commissioner relies upon the law of Illinois to establish in this case the possibility of a reverter to the settlor, by operation of the Illinois law, he has been "hoist with his own petard."

IV. The Fourth Proposal Assumes That a Possibility of a Reverter Exists and That the Factual Intent of the Settlor May Be Disregarded.

This proposal is reached only if the foregoing conclusions as to the law of Illinois are disregarded. It is the solution adopted in the opinion of the Court. If it is assumed that the possibility of reverter in favor of the settlor may be said to have arisen under the law of Illinois,

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and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, *then* the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita."

The corresponding provision of the Lachenmyer trust, italics supplied, is as follows:

"*Third*—After the death of my said wife all of said property and estate above mentioned and described to go *to my children,* share and share alike, *and shall any of my children die, then* the children of such deceased child, should any children be surviving such deceased child, to take the share of the parent so deceased; *and should any of my children die leaving no issue, then* the share of such deceased child shall be divided equally among my surviving children." *Lachenmyer* v. *Gehlbach, supra,* at p. 13.

Contrasting provisions, specifically recognized by the court below as examples of contingent remainders in an *inter vivos* trust, are found in *Klein* v. *United States,* 283 U. S. 231, 232–233. The court below also cited *Haward* v. *Peavey,* 128 Ill. 430, 21 N. E. 503, and *Baley* v. *Strahan,* 314 Ill. 213, 145 N. E. 359, involving wills and recognizing the contingent character of the remainders in the *Klein* case.

then under existing precedents, if we look no further, the federal estate tax would be applicable here and a decision is called for against the taxpayers. The fifth proposal presents the view that the statute requires us to look further and to determine the issue in reliance upon the factual intent of the settlor. However, even without going that far, a substantial case can be made in favor of the taxpayers even under this fourth proposal. That case is based upon the extreme remoteness of the possibility of reverter which is relied upon by the Commissioner. The remoteness of it is obvious from the fact that, even at the time of the execution of the trust when the chances of its realization were at their highest point, the possible reverter to the settlor was conceivable only if all three of the children of the settlor were to die before he did and were to die without descendants of their own. Disregarding the possibility of descendants of his children, the record shows an actuarial computation of the likelihood that the settlor would survive all three of his children of only about 1½ chances out of 100. On the basis of such a chance of realization, the computation gave a value of about $4,000 to a trust corpus of $1,000,000. To tax the settlor's estate more than $450,000, as is here proposed, because of the existence of this $4,000 worth of a possible reverter is not the kind of taxation that a court can readily imagine that Congress meant to impose. A proportion of 1½ to 100 suggests the appropriate application here of the maxim of *de minimis non curat lex.* The difficulty of applying that test as the sole basis of exemption is, however, obvious. On the other hand, this element of remoteness provides a thoroughly reasonable consideration which may be combined with other evidence to determine the presence or absence of the factual intent on the part of the settlor which is discussed in the fifth and final proposal.

V. The Fifth Proposal.

THE STATUTORY INTENT OF THE SETTLOR REQUIRED TO MAKE THE ESTATE TAX APPLICABLE IS ABSENT AND A CONTRARY INTENT IS PRESENT.

The undisputed evidence shows that, at the time of the transfer by trust, there was an absence of conscious intent on the part of the settlor that the trust property, or any part of it, should ever return to him or to his estate. In fact, there is strong evidence showing that he intended affirmatively to make a complete and irrevocable transfer which would exclude all possibility of a reverter to him. The trust recited as complete a transfer as any outright deed of gift would have recited if made directly to his children, except for the natural feature that, at their immature age, the transfer was made to trustees and these trustees were required by the irrevocable terms of the trust to deliver complete title to the settlor's children, or to their descendants, at a future date. The settlor's intent and the completeness of the transfer would have been no more complete if, instead of fixing the date for the future distribution of the trust property at the date of his own death, he had fixed it arbitrarily at December 19, 1940, which later proved to be the date of his death. The intent and completeness of the transfer, similarly, would have been no more complete if he had fixed the date of termination of the trust to coincide with the death of a third person instead of with his own death.

The Statute Requires a Finding of the Settlor's Intent.

Section 811 (c) requires us to find the settlor's intent as a condition of the application of that Section to this case. Accordingly, if the settlor had used language in his trust instrument which expressly, or even impliedly, had created or recognized a possible reverter in favor of the

settlor, that language in itself would have been evidence that the settlor had intended the trust to include a reverter in his favor and that he had intended the trust property, in the event of a realization of that reverter, to pass from him to his estate, under the 1920 trust, upon the expiration of that trust at his death.

It is, however, in the complete absence of such language in the trust instrument that the Government now claims that a possible reverter has arisen by operation of law. The existence of such a reverter, accordingly, may or may not have been *intended* in fact, and may not have been even thought about by the settlor. To say that the settlor must have intended all the legal consequences of his acts begs the question. So construed, the Section would have the same meaning as if the word "intended" had been omitted.

"Intended" should be given its normal, factual meaning. To intend means to "have in mind as a design or purpose." [12] The question of intent is one of fact, difficult to determine, but determinable, nevertheless. Section 811 (c) involves more than merely determining whether a transfer took effect, as a matter of law, at or after death or whether a "string or tie," as a matter of law, was retained until death. There remains for determination the fact whether the settlor did actually intend that the 1920 transfer take effect in possession or enjoyment upon the expiration of the trust at his death.

Section 811 (c) expressly covers transfers either "*in contemplation of* or *intended to take effect in possession or enjoyment at* or after . . . *death.*" (Italics supplied.) We have held that the settlor-decedent's motive must be determined before it can be held that a transfer was in contemplation of death. *United States* v. *Wells*, 283 U. S. 102. That case included a transfer in trust,

[12] Webster's New International Dictionary, 2d ed. (1938).

inter vivos, which was held not to have been made in "contemplation of . . . death." Similarly, factual intent should be found in order to determine whether a transfer was "intended to take effect in possession or enjoyment at or after . . . death." In *United States* v. *Wells,* Chief Justice Hughes, speaking for the Court, said (pp. 116–117):

> "The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. . . . As the transfer may otherwise have all the indicia of a valid gift *inter vivos,* the differentiating factor must be found in the transferor's motive."

In cases involving "contemplation of . . . death" under § 811 (c) the required motive impelling a transfer *"is a question of fact in each case."* (Italics supplied.) See *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630, 636. So also, in each case under § 811 (c), the question whether "the decedent has at any time made a transfer, by trust or otherwise, . . . intended to take effect in possession or enjoyment at or after his death, . . ." should be one of fact.

In determining the issue as to the settlor's intent in making his 1920 transfer, *inter vivos,* in the present case, the following considerations are material and persuasive:

1. *Language of the trust instrument.*—There was no language in this instrument which expressed or even affirmatively implied an intent to make a transfer to take effect in possession or enjoyment at or after the death of

the settlor rather than *in praesenti.* If the trust instrument had contained such an express or affirmatively implied declaration of the settlor's intent, it might have been conclusive of the issue. If there had been even a description of, or reference to, a possible reverter to the settlor, that would have been strong evidence of the intent required by § 811 (c). The absence of any such description or reference was consistent with a lack of intent that there be such a reverter. It was negative evidence to the effect that such a reverter was not intended and not desired by the settlor.

In an instrument of this kind it is natural for the settlor to give affirmative expression to each beneficial use to which he intends or desires the trust property to be put. It cannot be argued effectively in this case that the complete silence of the trust instrument on the subject of a possible reverter of the trust property to the settlor or to his estate amounted to an expression of intent by the settlor that such a reverter be permitted to arise by operation of law. As a matter of fact, the extrinsic evidence presented in this case tended to establish an opposite intent and desire.

In the present case, the overwhelming improbability of a complete failure of beneficiaries was so complete that it supplied a natural reason for omitting further provisions for distribution of the trust property. The likelihood that a 47-year-old settlor would outlive his three children and also his prospective grandchildren obviously was small. As it turned out, none of the settlor's three children predeceased him, and the distribution of the trust property was made to them without reaching his grandchildren. The facts of this case as they existed in 1920 presented to the settlor quite a different problem from that which would have been presented if, at that time, he had named as the only beneficiary of the trust a person with a life expectancy obviously shorter than his own.

Standing alone, the instrument evidences a simple transfer *in praesenti,* comparable to that in *Reinecke* v. *Northern Trust Co., supra.* The language of the instrument, therefore, certainly did not, in itself, require the property which was transferred, in 1920, to be included, in 1940, in the settlor's gross estate for federal estate tax purposes. If anything, the language itself, read in the light of Illinois law as stated above in the discussion of the third proposal and as regarded by the settlor in the light of the advice of his legal counsel, is expressive of an intent that there be no possibility of a reverter, and of an intent to make an absolute and complete transfer to the trustees *in praesenti.*

2. *Remoteness of the possible reverter.*—The remoteness of the possible realization of a suggested reverter (whether arising from express provision of a trust or by operation of law) is an important factor in establishing the probable intent of the settlor of any trust to make, thereby, a transfer to take effect in possession or enjoyment at or after his death. If the 1920 trust instrument had named as its sole beneficiary a person having a comparatively short life expectancy, then, assuming a reversion in favor of the settlor under Illinois law, the possibility of its occurrence would have been substantial. It would have been so great that, if the settlor had expressly mentioned such a reversion in the trust instrument, that mention of it would have substantially demonstrated the existence of the intent required by § 811 (c). Even if the settlor had made no express mention of such a reversion and thus had left its effectiveness wholly to the operation of the law of Illinois, the circumstances themselves, including the high probability of the realization of the reversion, would have supplied important evidence upon which to base a finding of the required intent on the part of the settlor. However, with the inclusion

of each additional youthful beneficiary of the trust, the basis for a conclusion that the settlor intended to establish a reversion to himself or to his estate and to postpone the transfer of the possession or enjoyment of the property until at or after his death was weakened.

The Tax Court, upon undisputed evidence, reduced to a mathematical basis the possibility presented by the suggested reverter in this case. The computations were stated to have been based upon a mortality table and an assumed rate of interest prescribed in Treasury Regulations as applicable to federal estate taxes. The computations also were stated to have been based upon assumed ages of a settlor and of beneficiaries corresponding substantially with those stated in the facts of this case. The computations showed that the probability that a person of the age of this settlor would survive three persons of the respective ages of the primary beneficiaries who were living at the date of the creation of this trust was only 0.01612, or about 1½ chances out of 100. Similarly, the value of the right of a person, of the age of the settlor in 1920, to receive $1 on the death of the last of three persons of the ages of the primary beneficiaries was $0.00390.

In 1920, the most favorable computation would thus have placed a value of less than $4,000 upon the settlor's interest in the suggested reverter relating to a $1,000,000 trust fund. These computations do not take into consideration the additional possibility that many grandchildren might have been born in time to qualify as beneficiaries of this trust, and thus further reduce the possibility of reverter. In fact, three such grandchildren were born in time to qualify—thus reducing the value to the settlor, in 1940, of the suggested reverter, on a $1,000,000 trust fund, to about $70. The relation of $70 to $1,000,000 ordinarily would be *de minimis* and cer-

tainly not one which would induce Congress to permit the assessment of a tax of over $450,000 because of its existence.

This demonstration of the remoteness of the possible reverter, if any, in this case is persuasive at least in showing the fact to have been that the settlor, in establishing this trust, probably intended it to be nothing other than a completed gift to those of his children or their descendants who might survive him.

In 1920 the gift, as such, was tax-free. Such a gift today would be subject to a gift tax. The assessment of a gift tax upon such a transaction emphasizes the impropriety, rather than the propriety, of also applying to it an estate tax at the death of the settlor. In 1920 the character of the gift was the same as it would be today and the fact that it was not subject to a gift tax then does not make it any more subject to the 1940 estate tax than if a gift tax had been paid upon it.

3. *Direct evidence of the intent of the settlor.*—Substantial evidence confirmed the absence of the factual intent necessary in order to make § 811 (c) applicable. There was no direct evidence indicating the existence of an actual intent on the part of the settlor to provide for a reverter to himself or to his estate or, in any other manner, to cause his 1920 transfer to trustees for the benefit of his descendants to take effect in possession or enjoyment at or after his death.

On the other hand, there was undisputed evidence indicating the absence of such an intent. In fact, it indicated the probable existence of a contrary intent. The Illinois attorney who drew the trust instrument testified that, prior to the drafting of the instrument, the settlor had stated that he desired and intended the trust property to be transferred to trustees for the benefit of his children and that he wanted at no time to retain any interest in it. The attorney added that, in drafting the trust, he had

endeavored to carry out the instructions of his client and that he believed he had done so. That attorney is a member of the firm representing the estate of the settlor-decedent in the instant case. As attorneys for the estate of the 1940 decedent, they argue that, under the law of Illinois, as they understood it and as they advised their client in 1920, there has not arisen any possibility of a reverter to the settlor under this trust by operation of law or otherwise. The receipt of that opinion by the settlor at the time of executing the trust instrument supports the petitioners' contention that the settlor then intended to translate into this Illinois trust his purpose to make an absolute and complete transfer of the subject matter of the trust, and thereby to make irrevocable provision for its future distribution.

In view of the uncontroverted and convincing evidence of the absence of any such factual intent on the part of the settlor as is required to bring his 1920 transfer within the terms of § 811 (c), and in view of the judgment of the Tax Court in favor of the settlor-decedent's executors, there is no need to remand the case to that court for a further finding in support of its judgment.

For the reasons stated in the foregoing discussion of the fifth proposal, and also for the reasons stated in the discussion of the third proposal to the effect that no possibility of a reverter arose in favor of the settlor by operation of the law of Illinois, I believe that the judgment of the United States Court of Appeals should be reversed.

Appendixes to MR. JUSTICE BURTON'S dissent.

Appendix I.

The trust instrument which is the subject of the decision in *Spiegel* v. *Commissioner*, *ante*, p. 701, is as follows:

"Know All Men By These Presents, that I, Sidney M. Spiegel, of the City of Chicago, County of Cook and State of Illinois, in

consideration of One Dollar ($1.00) and other good and valuable considerations, have sold, transferred, assigned, set over and delivered, and by these presents do sell, transfer, assign, set over and deliver to Modie J. Spiegel and Sidney M. Spiegel, and the survivor of them, as Trustees, six hundred twenty-five (625) shares of the capital stock of Spiegel's House Furnishing Company and seven hundred fifty (750) shares of the capital stock of Spiegel May Stern Company, In Trust, nevertheless, for the following uses and purposes, and upon the following terms and conditions:—

"1: The said Trustees, and the survivor of them, or any successor trustee, shall have full, absolute and complete power to hold, manage and control said shares and every part thereof; to sell, exchange, transfer or otherwise dispose of the same, or any part thereof, and to invest and reinvest the proceeds derived from any such sale or sales, or other disposition of said shares, or any part thereof, during the continuance of this trust. While said shares of stock, or any substitutes therefor, are held by said Trustees, or the survivor of them, or any successor Trustee, if any corporation whose stock or other securities are held by said Trustees should require any action of any kind to be taken, said Trustees, and the survivor and any successor trustee, shall have the same right to take any action which may be required of any stockholder or holder of any securities of any such corporation as if said Trustees, and the survivor and any successor held such shares or said securities in their own individual names and were the sole owners thereof.

"2: The Trustees, and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom, or from any substitutes therefor, and shall during the life of myself, said Sidney M. Spiegel, divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of my three (3) children, Katherine J. Spiegel, Sidney M. Spiegel, Jr. and Julia K. Spiegel,—such income to be distributed at convenient intervals each year. In the event that any of my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been entitled shall go to the child or children of such deceased child of mine, in equal parts, and if there be no such child or children of any such deceased child of mine, then such income shall be divided equally among the survivors of said three (3) children of mine, and their descendants, per stirpes and not per capita.

"3: Upon my death, the said Trustees, and the survivor of them, or any successor Trustee, shall divide said trust fund, and any accu-

mulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita.

"4: If during the continuance of this trust there shall be any increase in the principal of said trust estate by reason of the declaration of any stock dividends or other increases or emoluments all such increases shall be and remain a part of said trust estate and shall be held by said Trustees upon the same terms and conditions as are herein set forth.

"5: In the event of the death, refusal, inability, or failure for any reason to act of both said Trustees at any time during the continuance of this trust, then The Chicago Title & Trust Company shall become the successor Trustee, with the same rights, powers, duties and obligations as are herein vested in and imposed upon the Trustees, and the survivor thereof, hereinbefore named.

"6: None of the beneficiaries of the trust estate shall at any time be permitted to anticipate the payments to which any of them may be entitled hereunder by any order, assignment or otherwise.

"In Witness Whereof I have hereunto set my hand and seal, at Chicago, Illinois, as of the 2nd day of January, 1920.

Sidney M. Spiegel. (Seal)

"We hereby accept the above-named shares of stock and agree to hold the same subject to the terms above-mentioned, as of the 2nd day of January, 1920.

Modie J. Spiegel. (Seal)
Sidney M. Spiegel. (Seal)"

Appendix II.

The Northern Trust Company trust instrument No. 4477, which is one of the "five trusts" considered in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, is as follows (italics supplied):

"This indenture, made this first day of March, in the year of our Lord one thousand nine hundred and nineteen (A. D. 1919), by and between Adolphus C. Bartlett, of the city of Chicago, county of Cook, and State of Illinois, the party of the first part, and

the Northern Trust Company (hereinafter termed the 'trustee'), of Chicago, a corporation organized and doing business under the laws of the State of Illinois, the party of the second part, witnesseth:

"Article First

"That the party of the first part, being desirous of establishing and creating the trust hereinafter mentioned, for the purposes and upon the terms set forth, in consideration of the premises and influenced by love and affection for the beneficiaries hereinafter named, does hereby sell, assign, transfer, and set over unto the trustee the following securities, to wit:

1,000 shares of the stock of the Northern Trust Company.
784 shares of the stock of the Commonwealth Edison Company.
300 shares of the stock of the Illinois Central Railroad Company.
300 shares of the common stock of the Chicago & Northwestern Railroad Company.
200 shares of the preferred stock of the Chicago & Northwestern Railroad Company.
100 shares of the stock of the Pullman Company.
5 bonds of Armour & Company, for $1,000 each.
15 bonds of Morris & Company, for $1,000 each.

"Also the following-described notes secured by mortgage on real estate in Phoenix, Arizona:

Maker:	*Amount*
Rollin S. Howard	5,000.00
W. S. Dorman	5,000.00
Edgar O. Faucett	22,500.00
Elisha T. Waters	5,000.00
Roy S. Goodrich	40,000.00
Wilson W. Dobson	7,000.00
Redwell Music Company	20,000.00
Pauline M. O'Neil	25,000.00
Pauline M. O'Neil	5,000.00

to be held and disposed of under and in pursuance of this indenture.

"Article Second

"The trustee shall have power and authority at any time, and from time to time—

"(1) To receive and collect all dividends declared and paid upon any shares of stock at any time subject to the terms of this agreement,

and the interest upon all moneys, bonds, and obligations at any time held by it hereunder, and also all rents and other income which shall accrue or become due and payable on or from any of the trust estate hereunder.

"(2) To sell, transfer, assign, and convey any or all of the stocks, bonds, obligations, securities, real estate, or other property held at any time by said trustee under this instrument, and to invest and reinvest the proceeds thereof in either real or personal property, including dividend-paying stocks of corporations; *provided, however, that during the life of said party of the first part said trustee shall be governed by any instructions or directions in writing given to it by said party of the first part in regard to the management, sale, or investment of any part of the said trust estate, and said trustee shall be free from any liability or responsibility for any action by it done under or in pursuance of any such written direction or instruction.* In no event shall any purchaser from the trustee, or any person or corporation dealing with the trustee, be required to ascertain the authority and power of the trustee to make any sale, conveyance, or transfer of any part of the trust estate held hereunder, but every such purchaser and all other parties shall be entitled to rely upon the delivery of the transfer, assignment, or conveyance by the trustee of any or all of said trust estate as having been in all respects fully authorized, and shall not be affected by any notice to the contrary, or be required to see to the application of the purchase money.

"(3) To exercise the voting power upon all shares of stock held by the trustee hereunder, and to exercise every power, election, and discretion, give every notice, make every demand, and do every act and thing in respect of any shares of stock or bonds, or other obligations and securities held by the trustee hereunder, which it might or could do if it were the absolute owner thereof; *provided, however, that upon the written request of said first party it shall be the duty of the trustee to execute, or cause to be executed, to the person or persons named in such requests a proxy, entitling him or them (with full power of substitution) to vote in respect of any shares of stock in such written request or proxy defined and mentioned, at any meeting or meetings of the stockholders of any corporation or corporations specified in such request and proxy.*

"(4) To receive any and all stock dividends declared, and any other distribution which may be made by any corporation, any of whose shares of stock at the time constitute a part of the principal of the trust estate, and also all proceeds which may be paid on or

in respect of any such shares of stock on the liquidation of the company issuing the same, or upon the sale (whether voluntary or involuntary) of its assets, or any part thereof, or which may be otherwise paid out of capital or on account of the principal of any bond, stock, or other security; and may in its discretion join in any plan of reorganization or of readjustment of any corporation, any of whose shares of stock, bonds, or other securities or obligations may at any time constitute a part of the principal of the trust estate, and accept the substituted securities in and by said plan allotted in respect to the securities and obligations so held by the trustee.

"(5) To execute leases of any real estate which shall form a part of the said trust at any time, at such rental, and upon such terms, and for such length of time (not exceeding two hundred (200) years) as it may deem best; to erect buildings, or to change, alter, or make additions to any existing buildings upon any real estate which may form a part of said trust estate; and to do all other acts in relation to the said real estate which in the judgment of said trustee shall be needful or desirable to the proper and advantageous management thereof, so as to protect the same and make the same productive; *provided, however, that in every case the said trustee shall observe and be governed by any instructions or requests in relation thereto made by an instrument in writing, signed by said first party.*

"Article Third—Distribution and application of income

"(1) During the joint lives of the said party of the first part and his wife, Abby H. Bartlett, the said trustee shall pay to the said Abby H. Bartlett the sum of two thousand dollars ($2,000.00) on the last day of each month, and the residue of said net income shall be accumulated in the hands of the said trustee and kept invested in the same manner as said trustee is authorized to invest the principal of said trust.

"The said payments to the said Abby H. Bartlett are in lieu of the monthly payments now being made to her under an existing agreements [*sic*], and not in addition thereto.

"(2) From and after the death of the said party of the first part, the said payment of two thousand dollars ($2,000.00) in each month shall continue to be made to the said Abby H. Bartlett, until she shall either die or become entitled to a share of said first party's estate otherwise than under his will, bearing even date herewith; and the residue of said net income shall in each year be paid by said trustee to the four (4) children of said party of the first part,

viz, Maie Bartlett Heard, Frederic Clay Bartlett, Florence Dibell Bartlett, and Eleanor Bartlett Perdue, or the survivors of them, in equal shares; provided, however, that in the event of the death of either of said children of said party of the first part leaving issue surviving, such surviving issue shall stand in the place of such deceased child and receive the share of said net income which such deceased child would have received if living; it being the intention of said party of the first part that all payments to his wife, Abbey [*sic*] H. Bartlett, under this trust shall cease and be at an end upon her becoming entitled to any share or portion of his estate otherwise than under his will, bearing even date herewith, and that, subject to the payments hereinbefore directed to be made to said Abby H. Bartlett, the net income of said trust estate shall be paid to the children of said party of the first part (and the issue of any deceased child) in the shares above specified during the continuance of the trust hereby created.

"Article Fourth—Distribution of principal of trust estate

"The trust hereby created shall terminate at the expiration of five (5) years from the death of the party of the first part unless the said Abby H. Bartlett shall then be living and be entitled to receive monthly payments out of the net income of said trust estate under the provisions of this indenture, in which case this trust shall continue until the death of said Abby H. Bartlett, and shall then terminate.

"Upon the termination or expiration of the trust hereby created, the trust estate then in the hands of said trustee shall be paid over and distributed as follows:

"(a) One-fourth (¼) thereof to each of the four (4) children of said party of the first part hereinbefore named, viz, Maie Bartlett Heard, Frederic Clay Bartlett, Florence Dibell Bartlett, and Eleanor Bartlett Perdue;

"(b) If either of said four (4) children shall not then be living, his or her one-fourth (¼) of said trust estate shall be paid over and distributed to the then surviving issue of such deceased child per stirpes; and in default of such surviving issue, then to the surviving issue of said party of the first part per stirpes.

"Article Fifth—Concerning the trustee

"The trustee hereby accepts the trust created by this indenture, and agrees to act in accordance with its terms and provisions. The trustee may consult with counsel and shall be fully protected in

any action or nonaction taken, permitted or suffered by it in good faith and in accordance with the opinion of counsel selected or provided by it; and in case of legal proceedings involving the trustee or the principal of the trust estate, the trustee may defend such proceedings or may, upon being advised by such counsel that such action is necessary or advisable for the protection of the interests of the trustee, or of the beneficiaries, institute any legal proceedings.

"The trustee shall be reimbursed and indemnified against any and all liability, loss, or expense because of the holding of any shares of stock or other properties constituting a part of the principal of the trust estate, either in its own name or in the name of a nominee, and shall have a lien upon the principal of the trust estate and the income therefrom for the amount of any liability, loss, or expense which may be so incurred by it, including the expense of defending any action or proceeding instituted against it or such nominee by reason of any such holding.

"Out of the income of the principal of the trust estate the trustee shall pay all taxes, assessments, or other governmental charges which it may be required to pay or to retain because or in respect of any part of the principal of the trust estate or the income therefrom or the interest of the trustee therein, or the interest of any beneficiary or other person therein, under any present or future law of the United States, or of any State, county, municipality, or other taxing authority therein, any and all such taxes, assessments, or other governmental charges lawfully imposed being charged as a lien upon the said income, and in case of deficiency of said income upon the principal of the trust estate.

"All payments or distribution of income to beneficiaries in this indenture provided for shall be made out of net income, current or accumulated, then in the hands of the trustee.

"The said trustee, or any successor in trust, may resign at any time by giving notice in writing of such resignation to said first party while he shall live, and after his death by giving notice in writing of such resignation to either one of the beneficiaries hereinbefore named.

"*In case of the resignation of any trustee acting hereunder, or of its disability or incapacity to further act as trustee, the said party of the first part, if living,* and after his death a majority of the five (5) beneficiaries hereinbefore named, viz, the wife and four (4) children of said party of the first part, or a majority of the survivors of them, *shall have power to appoint a successor* in trust by an instrument in writing duly signed by him or them and delivered to said trustee,

and upon the appointment of such successor in trust the said trustee shall convey, assign, transfer, and deliver to such successor in trust all of the trust estate then in its hands, and thereupon and thereafter such successor in trust shall have all the rights, powers, duties, and authority which are granted to or imposed on said original trustee under the provisions of this indenture.

"Article Sixth—Miscellaneous provisions

"(1) *Said grantor has created the foregoing trusts to provide for the support and maintenance of the beneficiaries entitled to share in the income of said trust estate, and the said beneficiaries shall have no power to anticipate, assign, or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law.*

"(2) *Any of the provisions of this trust deed may be altered, changed, or modified in any respect and to any extent at any time during the life of said party of the first part by the delivery to said trustee of an instrument in writing signed by said party of the first part and by a majority of the five (5) beneficiaries hereinbefore named, or by a majority of the survivors of said five beneficiaries.*

"(3) The beneficiaries, or any or either of them, may act through an attorney in fact in signing any and all instruments delivered to the trustee under this indenture, with like effect as though signed in person, and any or either of said beneficiaries may act as such attorney in fact when authorized so to do.

"In witness whereof the parties hereto have executed this instrument, under seal, the day and year first above written.

ADOLPHUS C. BARTLETT. [SEAL.]
THE NORTHERN TRUST COMPANY,
By SOLOMON A. SMITH, *President.*

"Attest:
H. H. ROCKWELL,
Assistant Secretary."

EDITORIAL NOTE.

The next page is purposely numbered 801. The numbers from 743 to 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the *official* citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM THE BEGINNING OF THE OCTOBER TERM, 1948, THROUGH JANUARY 17, 1949.*

OCTOBER 5, 1948.

Miscellaneous Orders.

No. ——. JOHNSON ET AL. *v.* STEVENSON. On consideration of the supplemental motion for stay submitted by counsel for the petitioners, it is ordered by this Court that the motion to expand the order of MR. JUSTICE BLACK of September 29, 1948, be, and it is hereby, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this motion. *Alvin J. Wirtz, James V. Allred, Thurman Arnold, Abe Fortas, Hugh Cox, Raymond Buck, Luther E. Jones, Jr.* and *Everett L. Looney* for petitioners. *Henry H. Brooks* and *Dan Moody* for respondent. Reported below: 170 F. 2d 108.

No. ——. JOHNSON ET AL. *v.* STEVENSON. On consideration of the motion of counsel for Coke R. Stevenson to vacate the order of MR. JUSTICE BLACK of September 29, 1948, and to dismiss the proceedings, it is ordered by this Court that the said motion be, and it is hereby, denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this motion. *Alvin J. Wirtz, James V. Allred, Thurman Arnold, Abe Fortas, Hugh Cox, Raymond Buck, Luther E. Jones, Jr.* and *Everett L. Looney* for petitioners. *Henry H. Brooks* and *Dan Moody* for respondent. Reported below: 170 F. 2d 108.

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*For decisions *per curiam* and orders announced on June 21, 1948, see 334 U. S. 854 *et seq.*

October 11, 1948.

Per Curiam Decisions.

No. 87. Brand *v.* Milwaukee County et al. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* The appeal is dismissed for want of jurisdiction. Title 28, United States Code, § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by Title 28, United States Code, § 2103, certiorari is denied. *Charles L. Mullen* for appellant. *Oliver L. O'Boyle* for appellees. Reported below: 251 Wis. 531, 30 N. W. 2d 238.

No. 89. United States *v.* Maryland & Virginia Milk Producers Association, Inc. et al. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The motions to transfer are granted and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit pursuant to Title 18, United States Code, § 3731. *United States* v. *Swift & Co.*, 318 U. S. 442; *United States* v. *Wayne Pump Co.*, 317 U. S. 200. *George T. Washington,* then Acting Solicitor General, for the United States. *Elwood H. Seal* for the Maryland & Virginia Milk Producers Assn., Inc.; *William Blum, Jr.* for Alexandria Dairy Products Co., Inc.; *John J. Wilson* for the Chestnut Farms-Chevy Chase Dairy; *William E. Leahy* and *William J. Hughes, Jr.* for Derrick; *Elisha Hanson, Arthur B. Hanson* and *Letitia Armistead* for Safeway Stores, Inc.; *John F. Hillyard* for Simpson Bros., Inc.; and *Raymond Sparks* for Thompson's Dairy, Inc., appellees.

No. 97. Munoz *v.* Polk, Sheriff. Appeal from the Court of Criminal Appeals of Texas. *Per Curiam:* The appeal is dismissed for want of a properly presented fed-

eral question. *Bernard A. Golding* for appellant. Reported below: 151 Tex. Cr. ——, 209 S. W. 2d 767.

No. 189. MORRIS *v.* FORD MOTOR CO. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Morton A. Eden* for appellant. *Clayton C. Purdy* and *Frederic S. Glover, Jr.* for appellee. Reported below: 320 Mich. 372, 31 N. W. 2d 89.

No. 249. HOLLIDAY ET AL. *v.* GOVERNOR OF SOUTH CAROLINA ET AL. Appeal from the United States District Court for the Western District of South Carolina. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Henry Hammer* for appellants. *John M. Daniel,* Attorney General of South Carolina, *T. C. Callison* and *J. Monroe Fulmer,* Assistant Attorneys General, for appellees. Reported below: 78 F. Supp. 918.

No. 259. HOTARD ET AL. *v.* NEW ORLEANS ET AL. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion for leave to file supplemental statement opposing jurisdiction, motion to dismiss or affirm and motion for damages are granted. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Lester P. Schoene* for appellants. *Henry B. Curtis, David M. Wood, R. E. Milling, Jr., Harry McCall, Leonard B. Levy, J. Blanc Monroe, Walter J. Suthon, Jr., Arthur A. Moreno* and *James U. Ogden* for appellees. Reported below: 213 La. 843, 35 So. 2d 752.

No. 265. NORTH AMERICAN CO. *v.* KOERNER, JUDGE. Appeal from the Supreme Court of Missouri. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

Frank Y. Gladney, J. C. Jones, Roland F. O'Bryen and *Fred L. Williams* for appellant. *Claude O. Pearcy* for appellee. Reported below: 357 Mo. 908, 211 S. W. 2d 698.

Miscellaneous Orders.

No. 156. DONOVAN *v.* QUEENSBORO CORPORATION ET AL.; and

No. 49, Misc. DONOVAN *v.* QUEENSBORO CORPORATION ET AL. In No. 156 the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is denied. In No. 49, Misc., the motion for leave to file petition for writ of certiorari is denied. *Edward F. Clark* and *John A. Shorten* for petitioner. *Charles H. Tuttle* for respondents.

No. 226, Misc., October Term, 1947. TAURISANO *v.* NEW YORK, 332 U. S. 849. Motion for leave to withdraw the record denied.

No. 17, Misc. HARRIS *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied. Motion for leave to file petition for mandamus also denied.

No. 20, Misc. CRAIG *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 22, Misc. EYER *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Reported below: — Md. —, 59 A. 2d 745.

No. 35, Misc. WHITE *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied. Mo-

tion for leave to file petition for writ of habeas corpus also denied.

No. 70, Misc. BUFORD *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 34, Misc. JACKSON *v.* HIATT, WARDEN;
No. 63, Misc. DIDATO *v.* SHAW, DIRECTOR;
No. 72, Misc. RICHARDSON *v.* MISSOURI;
No. 79, Misc. EX PARTE WHISTLER;
No. 84, Misc. EX PARTE CARUSO;
No. 87, Misc. ZELL *v.* WRIGHT, WARDEN;
No. 101, Misc. LANGFORD *v.* MAYO, STATE PRISON CUSTODIAN; and
No. 104, Misc. WHITE *v.* FEDERAL CORRECTIONAL INSTITUTION. The motions for leave to file petitions for writs of habeas corpus in these cases are severally denied.

No. 28, Misc. IN RE STATTMANN;
No. 39, Misc. IN RE HOHLER;
No. 93, Misc. IN RE WEISS; and
No. 103, Misc. IN RE WENTZEL. Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that motions for leave to file should be granted

and that the cases should be set for argument forthwith. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 11, Misc. FRASER *v.* UNITED STATES; and
No. 12, Misc. FRASER ET AL. *v.* UNITED STATES. Motion for leave to withdraw the petitions for writs of mandamus granted.

No. 61, Misc. HOWELL *v.* CLARK, ATTORNEY GENERAL; and
No. 96, Misc. WILSON *v.* HINMAN ET AL. The motions for leave to file petitions for writs of mandamus are denied.

No. 7, Misc. IN RE STINSON;
No. 15, Misc. MEDLOCK *v.* RAGEN, WARDEN;
No. 29, Misc. HARPER *v.* MICHIGAN; and
No. 57, Misc. MITCHELL *v.* RAGEN, WARDEN. Petitions denied.

No. 48, Misc. IN RE LEE. Application denied.

No. 80, Misc. JACKSON *v.* OKLAHOMA. Petition for appeal denied.

No. 88, Misc. MCKAIN *v.* LOUISIANA. Application denied.

No. 58. UNITED STATES EX REL. PASELA *v.* FENNO, COMMANDING OFFICER. Writ of certiorari, 334 U. S. 857, to the United States Court of Appeals for the Second Circuit dismissed per stipulation of counsel. *Frank A. Francis* and *Benedict M. Holden, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 167 F. 2d 593.

Certiorari Granted.

No. 53. WILKERSON *v.* McCARTHY ET AL., TRUSTEES. Supreme Court of Utah. Certiorari granted. *Parnell Black, Calvin W. Rawlings* and *Harold E. Wallace* for petitioner. *Waldemar Q. Van Cott* and *Dennis McCarthy* for respondents. Reported below: —— Utah ——, 187 P. 2d 188.

No. 54. CORAY, ANCILLARY ADMINISTRATOR, *v.* SOUTHERN PACIFIC CO. Supreme Court of Utah. Certiorari granted. *Parnell Black, Calvin W. Rawlings* and *Harold E. Wallace* for petitioner. *Paul H. Ray* and *S. J. Quinney* for respondent. Reported below: —— Utah ——, 185 P. 2d 963.

No. 63. KIMBALL LAUNDRY CO. *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. *William J. Hotz* for petitioner. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *Wilma C. Martin* for the United States. Reported below: 166 F. 2d 856.

No. 65. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. *v.* ACME FAST FREIGHT, INC. C. A. 2d Cir. Certiorari granted. *Roswell P. C. May, William F. Zearfaus, Thomas L. Ennis, Joseph Rosch* and *H. Brua Campbell* for petitioners. *Paul A. Crouch* for respondent. Reported below: 166 F. 2d 778.

No. 83. COMMISSIONER OF INTERNAL REVENUE *v.* PHIPPS. C. A. 10th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *W. Clayton Carpenter* for respondent. Reported below: 167 F. 2d 117.

No. 84. COMMISSIONER OF INTERNAL REVENUE *v.* WODEHOUSE. C. A. 4th Cir. Certiorari granted. *Solic-*

itor General Perlman for petitioner. *Watson Washburn* for respondent. Reported below: 166 F. 2d 986.

No. 88. LEIMAN ET AL. *v.* GUTTMAN ET AL. Court of Appeals of New York. Certiorari granted. *Copal Mintz* for petitioners. *Joseph Brandwene* for respondents. Reported below: 297 N. Y. 201, 78 N. E. 2d 472.

No. 91. FOLEY BROS., INC. ET AL. *v.* FILARDO. Supreme Court of New York, New York County. Certiorari granted. *Solicitor General Perlman* for petitioners. *Howard Henig* for respondent. Reported below: See 297 N. Y. 217, 78 N. E. 2d 480.

No. 92. H. P. HOOD & SONS, INC. *v.* DUMOND, COMMISSIONER OF AGRICULTURE & MARKETS. Supreme Court of New York, Albany County. Certiorari granted. *Warren F. Farr* for petitioner. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Robert G. Blabey* for respondent. Reported below: See 297 N. Y. 209, 78 N. E. 2d 476.

No. 109. FEDERAL POWER COMMISSION ET AL. *v.* INTERSTATE NATURAL GAS CO., INC. ET AL.;

No. 188. PUBLIC SERVICE COMMISSION OF MISSOURI *v.* INTERSTATE NATURAL GAS CO., INC. ET AL.;

No. 209. MEMPHIS LIGHT, GAS & WATER DIVISION *v.* INTERSTATE NATURAL GAS CO. ET AL.; and

No. 212. ILLINOIS COMMERCE COMMISSION ET AL. *v.* INTERSTATE NATURAL GAS CO. ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* for the Federal Power Commission, petitioner in No. 109; *Charles L. Henson* for petitioner in No. 188; *Charles C. Crabtree* for petitioner in No. 209; and *George F. Barrett,* Attorney General of Illinois, and *Albert E. Hallett,* Assistant Attorney General, for the Illinois Commerce Commission, peti-

tioner in No. 212. *William A. Dougherty, Henry P. Dart, Jr.* and *James Lawrence White* for the Interstate Natural Gas Co., Inc.; *William A. Dougherty* and *James Lawrence White* for the Mississippi River Fuel Corporation; *Edward P. Russell* for the Memphis Natural Gas Co.; and *Forney Johnston* for the Southern Natural Gas Co. et al., respondents. Reported below: 166 F. 2d 796.

No. 110. McComb, Wage & Hour Administrator, *v.* Jacksonville Paper Co. et al. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* and *William S. Tyson* for petitioner. *Louis Kurz* for respondents. Reported below: 167 F. 2d 448.

No. 121. Black Diamond Steamship Corp. *v.* Robert Stewart & Sons, Ltd. et al.; and

No. 130. United States *v.* Robert Stewart & Sons, Ltd. et al. C. A. 2d Cir. Certiorari granted. *John W. Crandall* for petitioner in No. 121. *Solicitor General Perlman* for the United States, petitioner in No. 130. Reported below: 167 F. 2d 308.

No. 128. Farmers Reservoir & Irrigation Co. *v.* McComb, Wage & Hour Administrator; and

No. 196. McComb, Wage & Hour Administrator, *v.* Farmers Reservoir & Irrigation Co. C. A. 10th Cir. Certiorari granted. *Frank N. Bancroft, Walter W. Blood* and *John P. Akolt* for petitioner in No. 128. *Solicitor General Perlman, John R. Benney, William S. Tyson, Bessie Margolin* and *Sidney S. Berman* for respondent in No. 128. *Solicitor General Perlman* and *Mr. Tyson* for petitioner in No. 196. Reported below: 167 F. 2d 911.

No. 129. Urie *v.* Thompson, Trustee. Supreme Court of Missouri. Certiorari granted. *Louis N. Wolf*

for petitioner. *Thomas J. Cole* and *D. C. Chastain* for respondent. Reported below: 357 Mo. 738, 210 S. W. 2d 98.

No. 132. UNITED STATES *v.* CORS. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Frank C. Mason* and *Harold A. Kertz* for respondent. Reported below: 110 Ct. Cl. 66, 75 F. Supp. 235.

No. 151. NATIONAL CARBIDE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 152. AIR REDUCTION SALES CO. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 153. PURE CARBONIC, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari granted. *Erwin N. Griswold, Boykin C. Wright, Edgar J. Goodrich* and *John A. Wilson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Hilbert P. Zarky* for respondent. Reported below: 167 F. 2d 304.

No. 179. WEADE ET AL. *v.* DICHMANN, WRIGHT & PUGH, INC. C. A. 4th Cir. Certiorari granted. *Michael F. Keogh, J. Robert Carey* and *Richard H. Love* for petitioners. *Leon T. Seawell* for respondent. Reported below: 168 F. 2d 914.

Nos. 184 and 185. GRAVER TANK & MFG. CO., INC. ET AL. *v.* LINDE AIR PRODUCTS CO. C. A. 7th Cir. Certiorari granted. *John F. Oberlin, Ashley M. Van Duzer, Thomas V. Koykka* and *Charles L. Byron* for petitioners. *John T. Cahill, James A. Fowler, Jr.* and *Richard R. Wolfe* for respondent. Reported below: 167 F. 2d 531.

No. 90. HENSLEE, COLLECTOR OF INTERNAL REVENUE, *v.* UNION PLANTERS BANK & TRUST CO. ET AL. C. A. 6th Cir.; and

No. 116. FOGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner in No. 90. *Maury Hughes* for petitioner in No. 116. *Roane Waring* for respondents in No. 90. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States in No. 116. Reported below: No. 90, 166 F. 2d 993; No. 116, 167 F. 2d 763.

No. 118. PETTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Edward Halle* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 168 F. 2d 221.

No. 143. KRULEWITCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted limited to question "3" presented by the petition for the writ, *i. e.*, whether it was prejudicial and reversible error for the trial court to receive in evidence, over objection, important alleged declarations of a co-conspirator after the termination of the alleged conspiracy and not in furtherance thereof. *Jacob W. Friedman* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 167 F. 2d 943.

No. 168. CITY OF NEW YORK *v.* SAPER, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari granted. *John P. McGrath* and *Isaac C. Donner* for petitioner. Reported below: 168 F. 2d 268.

No. 191. SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES ET AL. *v.* LILLEFLOREN ET AL.

Supreme Court of California. Certiorari granted. *Russell E. Parsons* and *Harold W. Kennedy* for the Farmer Bros. Co., petitioner. Reported below: 31 Cal. 2d 439, 189 P. 2d 265.

No. 197. National Labor Relations Board *v.* Crompton-Highland Mills, Inc. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Ralph Williams* for respondent. Reported below: 167 F. 2d 662.

No. 200. New York *v.* Carter, Trustee in Bankruptcy; and

No. 201. United States *v.* Carter, Trustee. C. A. 2d Cir. Certiorari granted. *Nathaniel L. Goldstein,* Attorney General of New York, and *Wendell P. Brown,* Solicitor General, for petitioner in No. 200. *Solicitor General Perlman* for the United States, petitioner in No. 201. Reported below: 168 F. 2d 272.

No. 216. Algoma Plywood & Veneer Co. *v.* Wisconsin Employment Relations Board. Supreme Court of Wisconsin. Certiorari granted. *Malcolm K. Whyte* for petitioner. *Stewart G. Honeck,* Deputy Attorney General of Wisconsin, for respondent. Reported below: 252 Wis. 549, 32 N. W. 2d 417.

No. 223. Joy Oil Co., Ltd. *v.* State Tax Commission. Supreme Court of Michigan. Certiorari granted. *Clayton F. Jennings* for petitioner. *Eugene F. Black,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, *Dale H. Fillmore* and *Joel K. Underwood* for respondent. Reported below: 321 Mich. 335, 32 N. W. 2d 472.

Certiorari Denied. (*See also supra, Nos. 87 and 156 and Misc. Nos. 17, 20, 22, 35, 49 and 70.*)

No. 55. LESSER *v.* SERTNER'S, INC. ET AL. C. A. 2d Cir. Certiorari denied. *Max R. Simon* for petitioner. *Michael M. Platzman* for respondents. Reported below: 166 F. 2d 471.

No. 57. VARGAS *v.* ESQUIRE, INC. C. A. 7th Cir. Certiorari denied. *Bernard Charles Schiff* for petitioner. *Edward R. Johnston* and *James A. Sprowl* for respondent. Reported below: 166 F. 2d 651.

No. 60. KAMMERER CORPORATION ET AL. *v.* MCCULLOUGH. C. A. 9th Cir. Certiorari denied. *Frederick S. Lyon, Leonard S. Lyon* and *Mark L. Herron* for petitioners. *R. Welton Whann, A. W. Boyken, Robert M. McManigal, W. Bruce Beckley* and *Kelly L. Taulbee* for respondent. Reported below: 166 F. 2d 759.

No. 61. TURNER DAIRY CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bergson, Charles H. Weston, J. Stephen Doyle, Jr., Neil Brooks* and *Lewis A. Sigler* for the United States. Reported below: 166 F. 2d 1.

No. 62. SPINA ET AL. *v.* RING. C. A. 2d Cir. Certiorari denied. *Jonas J. Shapiro* and *Philip Wittenberg* for petitioners. Reported below: 166 F. 2d 546.

No. 64. UNITED STATES *v.* C. B. ROSS CO., INC. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *M. Carl Levine* and *David Morgulas* for respondent. Reported below: 109 Ct. Cl. 690, 74 F. Supp. 420.

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No. 66. SANDSTROM *v.* CALIFORNIA HORSE RACING BOARD ET AL. Supreme Court of California. Certiorari denied. *Joseph Scott* for petitioner. *Fred N. Howser,* Attorney General of California, and *Walter L. Bowers,* Assistant Attorney General, for respondents. Reported below: 31 Cal. 2d 401, 189 P. 2d 17.

No. 67. YOUNG ET AL. *v.* GARRETT ET AL. Supreme Court of Arkansas. Certiorari denied. *DuVal L. Purkins* and *J. R. Wilson* for petitioners. *R. H. Wills* and *W. D. McKay* for respondents. Reported below: 212 Ark. 693, 208 S. W. 2d 189.

No. 68. UNITED STATES *v.* BLOEDEL DONOVAN LUMBER MILLS. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *Tom S. Patterson* for respondent. Reported below: 109 Ct. Cl. 720, 74 F. Supp. 470.

No. 69. J. H. ALLISON & Co. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *John A. Chambliss, Jr.* for petitioner. *Solicitor General Perlman, David P. Findling* and *Ruth Weyand* for respondent. Reported below: 165 F. 2d 766.

No. 70. REIN *v.* JOHNSON, AUDITOR OF PUBLIC ACCOUNTS, ET AL. Supreme Court of Nebraska. Certiorari denied. *Herbert W. Baird* for petitioner. Reported below: 149 Neb. 67, 30 N. W. 2d 548.

No. 72. TEXAS & PACIFIC RAILWAY CO. *v.* KILPATRICK; and

No. 73. TEXAS & PACIFIC RAILWAY CO. *v.* PARKER. C. A. 2d Cir. Certiorari denied. *Theodore Kiendl, William H. Timbers* and *Cleveland C. Cory* for petitioner. *William H. DeParcq* for respondents. Reported below: 166 F. 2d 788.

No. 74. St. Regis Paper Co. *v.* United States. Court of Claims. Certiorari denied. *Horace R. Lamb* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter* for the United States. Reported below: 110 Ct. Cl. 271, 76 F. Supp. 831.

No. 77. Trans-Pacific Corp. et al. *v.* Goggin, Trustee in Bankruptcy. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioners. *Thomas S. Tobin* for respondent. Reported below: 166 F. 2d 1021.

No. 79. E. C. Schroeder Co. *v.* Clark et al. C. A. 10th Cir. Certiorari denied. *W. E. Utterback* for petitioner. *Thos. W. Champion* and *Louis A. Fischl* for respondents. Reported below: 167 F. 2d 739.

No. 80. International Brotherhood of Teamsters & Chauffeurs, Local Union No. 179, A. F. of L., et al. *v.* Dinoffria et al. Supreme Court of Illinois. Certiorari denied. *Daniel D. Carmell* and *Walter F. Dodd* for petitioners. *Raymond J. Harvey* and *Samuel Saxon* for respondents. Reported below: 399 Ill. 304, 77 N. E. 2d 661.

No. 81. Thompson et al. *v.* Thompson et al., Executors. Supreme Court of Arkansas. Certiorari denied. *J. R. Wilson* for petitioners. *J. E. Gaughan* for respondents. Reported below: 212 Ark. 812, 208 S. W. 2d 445.

No. 82. Criner et al. *v.* Parham et al. Supreme Court of Arkansas. Certiorari denied. *J. R. Wilson* for petitioners. *W. D. McKay* and *E. M. Anderson* for respondents. Reported below: 212 Ark. 815, 208 S. W. 2d 447.

No. 85. BALTIMORE & OHIO RAILROAD CO. *v.* SKIDMORE. C. A. 2d Cir. Certiorari denied. *William C. Combs* for petitioner. *William A. Blank* for respondent. Reported below: 167 F. 2d 54.

No. 86. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *v.* CIVIL AERONAUTICS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Kaiser, Gerhard P. Van Arkel, Daniel D. Carmell* and *Samuel H. Jaffee* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bergson, Charles H. Weston* and *Emory T. Nunneley, Jr.* for the Civil Aeronautics Board; and *John W. Cross, Mac Asbill* and *Richard A. Fitzgerald* for the National Airlines, Inc., respondents.

No. 93. EBENSBERGER ET AL. *v.* SINCLAIR REFINING CO. C. A. 5th Cir. Certiorari denied. *J. B. Lewright* for petitioners. *W. R. Smith, Jr., Alfred McKnight* and *Nat. J. Harben* for respondent. Reported below: 165 F. 2d 803.

No. 94. IRIARTE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *José A. Poventud* and *F. Fernández Cuyar* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States. Reported below: 166 F. 2d 800.

No. 95. TINGLE ET AL. *v.* ANDERSON-TULLY CO. C. A. 5th Cir. Certiorari denied. *John Brunini* for petitioners. *Lamar Williamson* for respondent. Reported below: 166 F. 2d 224.

No. 96. W. E. HEDGER TRANSPORTATION CORP. *v.* IRA S. BUSHEY & SONS, INC. C. A. 2d Cir. Certiorari de-

nied. *Horace M. Gray* for petitioner. *Christopher E. Heckman* for respondent. Reported below: 167 F. 2d 9.

No. 99. McElroy *v.* Pegg et al. C. A. 10th Cir. Certiorari denied. *James W. Bounds* for petitioner. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States; and *Jeff Busby* for Pegg et al., respondents. Reported below: 167 F. 2d 668.

No. 100. Phillips Petroleum Co. *v.* Shell Oil Co., Inc. C. A. 5th Cir. Certiorari denied. *Louis D. Fletcher, R. B. F. Hummer* and *T. B. Hudson* for petitioner. *Theodore S. Kenyon, Brady Cole* and *Arthur B. Bakalar* for respondent. Reported below: 166 F. 2d 384.

No. 101. Freeman *v.* United States. C. A. 7th Cir. Certiorari denied. *Theodore E. Rein, Paul B. Cromelin* and *Francis C. Brooke* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 167 F. 2d 786.

No. 105. Nordling et al. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Carl E. Davidson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Harry Marselli* for respondent. Reported below: 166 F. 2d 703.

No. 106. Hightower et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *Edward J. Bradley* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States.

No. 108. Graham Flying Service *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari de-

nied. *Edward R. Burke* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Abbott M. Sellers* and *S. Walter Shine* for respondent. Reported below: 167 F. 2d 91.

No. 112. GENTRY *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *W. H. Strickland* for petitioner. *Harry McMullan,* Attorney General of North Carolina, *T. W. Bruton* and *Ralph Moody,* Assistant Attorneys General, for respondent. Reported below: 228 N. C. 643, 46 S. E. 2d 863.

No. 113. BATH MILLS, INC. *v.* ODOM. C. A. 4th Cir. Certiorari denied. *P. F. Henderson* for petitioner. *Henry Hammer* for respondent. Reported below: 168 F. 2d 38.

No. 114. BEST & CO., INC. *v.* MILLER, DOING BUSINESS AS MILLER'S LILLIPUTIAN SHOPPE. C. A. 2d Cir. Certiorari denied. *Joseph M. Proskauer, Harold H. Levin* and *M. James Spitzer* for petitioner. *Milton Handler* for respondent. Reported below: 167 F. 2d 374.

No. 119. DURANT *v.* HIRONIMUS, WARDEN. C. A. 4th Cir. Certiorari denied. *Hugh H. Obear* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Frederick Bernays Wiener, Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 168 F. 2d 288.

No. 120. BLACK, DOING BUSINESS AS SUPERIOR TRUCKING CO., *v.* INTERSTATE COMMERCE COMMISSION. C. A. 5th Cir. Certiorari denied. *Joseph H. Blackshear, Elliott Goldstein, Max F. Goldstein* and *B. D. Murphy* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bergson, Edward Dumbauld, Daniel W.*

Knowlton and *Daniel H. Kunkel* for respondent. Reported below: 167 F. 2d 825.

No. 122. REAGON *v.* D'ANTONIO. Court of Appeal of Louisiana, Parish of Orleans. Certiorari denied. *Lewis R. Graham* for petitioner. *Moses C. Scharff* for respondent.

No. 123. CARTER CARBURETOR CORP. *v.* KINGSLAND, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Hugh M. Morris, Gilbert P. Ritter* and *George R. Ericson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Melvin Richter* and *W. W. Cochran* for respondent. Reported below: 83 U. S. App. D. C. 266, 168 F. 2d 565.

No. 124. RINN, EXECUTRIX, ET AL. *v.* BROADWAY TRUST & SAVINGS BANK ET AL. Appellate Court of Illinois, First District. Certiorari denied. *Meyer Abrams* for petitioners. *Hector A. Brouillet* for Jaeger, Receiver, respondent. Reported below: 333 Ill. App. 157, 76 N. E. 2d 800.

No. 125. DEGRAZIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States.

No. 126. NEW YORK LIFE INSURANCE CO. *v.* COOPER ET AL. C. A. 10th Cir. Certiorari denied. *William F. Tucker* for petitioner. *Villard Martin* for respondents. Reported below: 167 F. 2d 651.

No. 127. PORT GIBSON VENEER & BOX CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari de-

nied. *W. H. Watkins* and *R. L. Dent* for petitioner. *Solicitor General Perlman, David P. Findling, Ruth Weyand* and *Fannie M. Boyls* for respondent. Reported below: 167 F. 2d 144.

No. 131. FITZSIMMONS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Eugene L. Garey, Wm. Henry Gallagher* and *Abraham Hornstein* for petitioner. *Eugene F. Black,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, *Daniel J. O'Hara,* Assistant Attorney General, and *H. H. Warner* for respondent. Reported below: 320 Mich. 116, 30 N. W. 2d 801.

No. 133. LEEDS ET AL., EXECUTORS, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Harry Levine* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Stanley M. Silverberg* and *Elizabeth B. Davis* for the United States. Reported below: 110 Ct. Cl. 645, 75 F. Supp. 312.

No. 136. CHEEK, TRUSTEE IN BANKRUPTCY, *v.* DIVISION OF LABOR LAW ENFORCEMENT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. *Francis F. Quittner* for petitioner. *Fred N. Howser,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for respondent. Reported below: 166 F. 2d 429.

No. 137. BLOOMFIELD RANCH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *O. K. Cushing, Eustace Cullinan* and *Delger Trowbridge* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Harry Baum* for respondent. Reported below: 167 F. 2d 586.

No. 138. SAMPSELL, TRUSTEE IN BANKRUPTCY, *v.* LAWRENCE WAREHOUSE CO. C. A. 9th Cir. Certiorari

denied. *Thomas S. Tobin* for petitioner. *Willard F. Williamson* and *W. R. Wallace, Jr.* for respondent. Reported below: 167 F. 2d 885.

No. 139. NEMOURS *v.* HICKEY ET AL. Supreme Court of Missouri. Certiorari denied. *J. L. London* for petitioner. Reported below: 357 Mo. 731, 210 S. W. 2d 94.

No. 140. FEDERAL BROADCASTING SYSTEM, INC. *v.* AMERICAN BROADCASTING CO., INC. ET AL. C. A. 2d Cir. Certiorari denied. *William L. McGovern* and *Seymour Krieger* for petitioner. *Thurman Arnold* and *Paul A. Porter* for the American Broadcasting Co., Inc.; and *Leon Lauterstein* for the Mutual Broadcasting System, Inc., respondents. *Solicitor General Perlman* filed a brief for the United States, as *amicus curiae,* supporting the petition. Reported below: 167 F. 2d 349.

No. 141. BORAK *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 110 Ct. Cl. 236, 78 F. Supp. 123.

No. 142. CAMPA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Floyd Duke James* for petitioner. *Solicitor General Perlman* for the United States.

No. 144. A. J. TRISTANI SUCRS., INC. *v.* BUSCAGLIA, TREASURER, ET AL.; and

No. 145. R. SANTAELLA & BROTHER, INC. *v.* BUSCAGLIA, TREASURER, ET AL. C. A. 1st Cir. Certiorari denied. *F. Fernández Cuyar* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *I. Henry Kutz* for Buscaglia, Treasurer, respondent. Reported below: 166 F. 2d 966.

No. 146. TEXAS STATE LIFE INSURANCE CO. ET AL. *v.* HOUGHTON. C. A. 5th Cir. Certiorari denied. *O. M. Street* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Morton Liftin* for respondent. Reported below: 166 F. 2d 848.

No. 148. THOMPSON, TRUSTEE, ET AL. *v.* SPEARMON ET AL. C. A. 8th Cir. Certiorari denied. *Leffel Gentry, Frank L. Mulholland, Clarence M. Mulholland, Willard H. McEwen* and *E. L. McHaney* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Liftin* for respondents. Reported below: 167 F. 2d 626.

No. 149. TITUS ET AL. *v.* SPITZER-RORICK TRUST & SAVINGS BANK ET AL. C. A. 6th Cir. Certiorari denied. *Robert J. Pleus* for petitioners. *Robert C. Dunn* for respondents. Reported below: 167 F. 2d 571.

No. 154. NEW AMSTERDAM CASUALTY CO. *v.* SOILEAU, TUTRIX. C. A. 5th Cir. Certiorari denied. *Joseph A. Loret* and *Thomas W. Leigh* for petitioner. Reported below: 167 F. 2d 767.

No. 157. WINSTON *v.* COUNTY OF COOK ET AL. Supreme Court of Illinois. Certiorari denied. *Weightstill Woods* for petitioner. *Jacob Shamberg* for respondents. Reported below: 399 Ill. 311, 77 N. E. 2d 664.

No. 158. MATTHEWS ET AL. *v.* WOODY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frederick DeJoseph* for petitioners. *J. Nelson Anderson* for respondents. Reported below: 83 U. S. App. D. C. 219, 167 F. 2d 756.

No. 159. Pacific Coast Wholesalers Association *v.* Clover Leaf Freight Lines, Inc. et al. C. A. 7th Cir. Certiorari denied. *David J. Shipman* for petitioner. *J. Glenn Shehee* for respondents. Reported below: 166 F. 2d 626.

No. 160. In re Rose. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. *Harold W. Hastings* for petitioner. *Einar Chrystie* and *Kenneth M. Spence* for the Bar Association of New York City, respondent. Reported below: See 297 N. Y. 953, 80 N. E. 2d 348.

No. 161. Chicago Pneumatic Tool Co. *v.* Independent Pneumatic Tool Co. C. A. 7th Cir. Certiorari denied. *Floyd H. Crews, Clarence J. Loftus* and *Raymond G. Mullee* for petitioner. *Lowell C. Noyes* for respondent. Reported below: 167 F. 2d 1002.

No. 162. Excel Auto Radiator Co. *v.* Bishop & Babcock Manufacturing Co. C. A. 6th Cir. Certiorari denied. *Max W. Zabel* for petitioner. *Arthur H. Boettcher* for respondent. Reported below: 167 F. 2d 962.

Nos. 163 and 164. Miller, doing business as the Perma-Stone Co., *v.* Zaharias et al., doing business as the Lincoln Home Builders, et al. C. A. 7th Cir. Certiorari denied. *Ira Milton Jones* for petitioner. *David Charness* for Zaharias et al., respondents. Reported below: 168 F. 2d 1.

No. 165. Akers et ux. *v.* Scofield, Collector of Internal Revenue. C. A. 5th Cir. Certiorari denied. *Robert Ash* for petitioners. *Solicitor General Perlman,*

Assistant Attorney General Caudle, Ellis N. Slack and *Melva M. Graney* for respondent. Reported below: 167 F. 2d 718.

No. 166. JOHNSON ET AL. *v.* SMITH, COUNTY TREASURER, ET AL. Supreme Court of New York, Albany County. Certiorari denied. *Harold J. Hinman* for petitioners. *Neile F. Towner* and *Robert E. Whalen* for Smith, County Treasurer; and *Jack Goodman* for Sandler et al., respondents. Reported below: See 297 N. Y. 954, 80 N. E. 2d 349.

No. 167. RAILWAY EXPRESS AGENCY, INC. *v.* MALLORY. C. A. 5th Cir. Certiorari denied. *James L. Byrd, Harry S. Marx* and *Chas. C. Evans* for petitioner. *Charles F. Engle* for respondent. Reported below: 168 F. 2d 426.

No. 169. THOMPSON, TRUSTEE, *v.* CAMP, ADMINISTRATRIX. C. A. 6th Cir. Certiorari denied. *Edward P. Russell* for petitioner. *Walter P. Armstrong* and *R. G. Draper* for respondent. Reported below: 167 F. 2d 733.

No. 171. REINOLD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Martin A. Schenck* and *Frederick R. Graves* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for the United States. Reported below: 167 F. 2d 556.

No. 172. SPAGNUOLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry K. Chapman* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 168 F. 2d 768.

No. 173. DEWATERS *v.* MACKLIN COMPANY. C. A. 6th Cir. Certiorari denied. *Jack N. Tucker* and *Morton*

A. Eden for petitioner. *Maxwell F. Badgley* and *Frank E. Cooper* for respondent. Reported below: 167 F. 2d 694.

No. 174. UNITED STATES *v.* SILLIMAN. C. A. 3d Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Frederic M. P. Pearse, Sherwood D. Silliman* and *Reuben D. Silliman* for respondent. Reported below: 167 F. 2d 607.

No. 175. ECCO HIGH FREQUENCY CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Everett Frooks* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Morton K. Rothschild* for respondent. Reported below: 167 F. 2d 583.

No. 177. MASON *v.* PARADISE IRRIGATION DISTRICT. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *P. M. Barceloux* for respondent.

No. 180. MARIO MERCADO RIERA, EXECUTOR, *v.* ADRIAN MERCADO RIERA ET AL. C. A. 1st Cir. Certiorari denied. *Pedro M. Porrata* for petitioner. *José A. Poventud* and *F. Fernández Cuyar* for respondents. Reported below: 167 F. 2d 207.

No. 181. CHESBROUGH ET AL. *v.* WESTERN & SOUTHERN LIFE INSURANCE CO. ET AL. Supreme Court of Ohio. Certiorari denied. *Sol Goodman* for petitioners. *Webb I. Vorys* for respondents. Reported below: 149 Ohio St. 578, 79 N. E. 2d 909.

No. 183. REMINGTON RAND, INC. *v.* ROYAL TYPEWRITER CO., INC. C. A. 2d Cir. Certiorari denied. *Edwin T. Bean, Henry R. Ashton, Francis J. McNamara*

and *Conrad Christel* for petitioner. *William H. Davis* and *George E. Faithfull* for respondent. Reported below: 168 F. 2d 691.

No. 186. HART ET AL. *v.* MUTUAL BENEFIT LIFE INSURANCE CO. C. A. 2d Cir. Certiorari denied. *Lawrence R. Condon* for petitioners. *James M. Snee* for respondent. Reported below: 166 F. 2d 891.

No. 190. LANDSBOROUGH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Hal H. Griswold* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 168 F. 2d 486.

No. 192. RAKES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Robert H. McNeill* and *Thomas Bruce Fuller* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 169 F. 2d 739.

No. 194. CENTRAL INVESTMENT CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Joseph D. Brady* and *John O. Paulston* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Irving I. Axelrad* for respondent. Reported below: 167 F. 2d 1000.

No. 199. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* MATSUMOTO. C. A. 7th Cir. Certiorari denied. *Lowell Hastings* and *Warren Newcome* for petitioner. Reported below: 168 F. 2d 496.

No. 202. ECONOMOS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Thomas M. Wilkins* for petitioner. *Solicitor General Perlman,*

Assistant Attorney General Caudle, Ellis N. Slack and *S. Walter Shine* for respondent. Reported below: 167 F. 2d 165.

No. 203. PARIS ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. *Louis B. Boudin* for petitioners. *Burton A. Zorn* and *Eugene Eisenmann* for the Metropolitan Life Insurance Co., respondent. Reported below: 167 F. 2d 834.

No. 207. LADNER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Webb M. Mize* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 168 F. 2d 771.

No. 208. ATLANTIC COAST LINE RAILROAD CO. *v.* MCCREADY. Supreme Court of South Carolina. Certiorari denied. *Charles Cook Howell* and *V. E. Phelps* for petitioner. Reported below: 212 S. C. 449, 48 S. E. 2d 193.

No. 210. STONE *v.* STRICKLAND TRANSPORTATION CO. C. A. 5th Cir. Certiorari denied. *Dorsey Hardeman* for petitioner. *Cleo G. Clayton, Sr.* for respondent. Reported below: 168 F. 2d 752.

No. 211. KELLEY *v.* UNION TANK & SUPPLY CO. C. A. 5th Cir. Certiorari denied. *Dorsey Hardeman* for petitioner. *Chas C. Crenshaw* for respondent. Reported below: 167 F. 2d 811.

No. 213. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George H. Koster* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle,*

Ellis N. Slack and *Fred E. Youngman* for the United States. Reported below: 168 F. 2d 399.

No. 215. UNITED SERVICES LIFE INSURANCE CO. *v.* BOYE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Neil Burkinshaw* for petitioner. *Thomas M. Raysor* for respondents. Reported below: 83 U. S. App. D. C. 306, 168 F. 2d 570.

No. 217. HORNER *v.* COUNTY OF WINNEBAGO ET AL. Appellate Court of Illinois, Second District. Certiorari denied. *John R. Snively* for petitioner. *Jerome J. Downey* for respondents. Reported below: 332 Ill. App. 217, 74 N. E. 2d 728.

No. 220. WHITNEY *v.* MADDEN. Supreme Court of Illinois. Certiorari denied. *William H. DeParcq* and *Tom Davis* for petitioner. *Thomas L. Marshall* for respondent. Reported below: 400 Ill. 185, 79 N. E. 2d 593.

No. 222. RAILWAY EMPLOYES' DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR ET AL. *v.* NORTHERN PACIFIC RAILWAY CO. C. A. 8th Cir. Certiorari denied. *Frank L. Mulholland, Clarence M. Mulholland, Willard H. McEwen* and *Edward J. Hickey, Jr.* for petitioners. *L. B. daPonte* and *M. L. Countryman, Jr.* for respondent. Reported below: 168 F. 2d 934.

No. 224. CHARLES E. AUSTIN, INC. *v.* KELLY, SECRETARY OF STATE. Supreme Court of Michigan. Certiorari denied. *Clayton F. Jennings* for petitioner. *Eugene F. Black,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent. Reported below: 321 Mich. 426, 32 N. W. 2d 694.

No. 230. MINNESOTA MINING & MANUFACTURING CO. *v.* INDUSTRIAL TAPE CORP. C. A. 7th Cir. Certiorari denied. *George I. Haight, Harold J. Kinney* and *M. K. Hobbs* for petitioner. *Drury W. Cooper* for respondent. Reported below: 168 F. 2d 7.

No. 239. PENNSYLVANIA-CENTRAL AIRLINES CORP. *v.* DUSKIN, EXECUTRIX. C. A. 6th Cir. Certiorari denied. *Lowell W. Taylor* for petitioner. *R. G. Draper, Walter P. Armstrong* and *Benj. Goodman, Jr.* for respondent. Reported below: 167 F. 2d 727.

No. 78. TAUSSIG *v.* BARNES, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied. *Stephen A. Mitchell, Daniel M. Healy* and *Arthur Frankel* for petitioner. *Mural J. Winstin* and *Horace A. Young* filed a brief for Saxelby et al., as *amici curiae,* opposing the petition.

No. 102. ILLINOIS EX REL. TINKOFF ET AL. *v.* NORTHWESTERN UNIVERSITY ET AL. Appellate Court of Illinois, First District. Certiorari denied. Reported below: 333 Ill. App. 224, 77 N. E. 2d 345.

No. 103. LOBAIDO *v.* MICHIGAN. Recorder's Court of the City of Detroit, Michigan; and

No. 104. LOBAIDO *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *David W. Louisell* and *William G. Fitzpatrick* for petitioner. *Eugene F. Black,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 147. LINDENFELD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor*

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General Perlman and *Robert S. Erdahl* for the United States. Reported below: 167 F. 2d 1002.

No. 155. MASSACHUSETTS MUTUAL LIFE INSURANCE Co. *v.* SMITH. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Harlan Hobart Grooms* for petitioner. *James A. Simpson* for respondent. Reported below: 167 F. 2d 990.

No. 176. REINING *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to amend the petition for writ of certiorari granted. Certiorari denied. *Alex W. Swords* and *Stanley Suydam* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 167 F. 2d 362.

No. 195. MCCLENDON *v.* UTECHT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 168 F. 2d 837.

No. 5, Misc. TOTTEN *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 6, Misc. SAMMAN *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 167 F. 2d 543.

No. 8, Misc. CREBS *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 9, Misc. BOLDEN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 13, Misc. CANNADY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 14, Misc. TOUHY *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 16, Misc. MCMULLEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 400 Ill. 253, 79 N. E. 2d 470.

No. 18, Misc. COLLINS *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 21, Misc. DUANE *v.* HEINZE, WARDEN. District Court of Appeal, 3d Appellate District, of California. Certiorari denied.

No. 23, Misc. ENGLE *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 24, Misc. WALL *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 25, Misc. THOMPSON *v.* BENSON, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 26, Misc. MILFORD *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 273 App. Div. 809, 76 N. Y. S. 2d 544.

No. 27, Misc. FELTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Allen J. Krouse* for petitioner. *Solicitor General Perlman, Assistant Attorney*

General Quinn, Robert S. Erdahl and *Josephine H. Klein* for the United States. Reported below: 83 U. S. App. D. C. 277, 170 F. 2d 153.

No. 31, Misc. BLAHA *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 33, Misc. HARTNETT *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 36, Misc. WILSON *v.* RAGEN, WARDEN. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 37, Misc. WILLIAMS *v.* RAGEN, WARDEN. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 38, Misc. COBB *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 167 F. 2d 888.

No. 40, Misc. ALLEN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 42, Misc. EATON *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 43, Misc. GOOCH *v.* WILHITE, PRESIDING JUDGE. Circuit Court of Scott County, Illinois. Certiorari denied.

No. 44, Misc. HRYCIUK *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 45, Misc. TOWNSEND *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 46, Misc. SWAIN *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 51, Misc. LAWRENCE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 52, Misc. RENO *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Reported below: 321 Mich. 497, 32 N. W. 2d 723.

No. 56, Misc. ST. JOHN *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 58, Misc. CLARK *v.* RAGEN, WARDEN. Circuit Court of Hancock County, Illinois. Certiorari denied.

No. 59, Misc. BAILEY *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 60, Misc. BARNETT *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 62, Misc. LEE *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 64, Misc. SAUNDERS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 65, Misc. SANNER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: — Md. —, 59 A. 2d 762.

No. 66, Misc. EPPLE *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 68, Misc. BROWN *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *Douglas McKay* for petitioner. Reported below: 212 S. C. 237, 47 S. E. 2d 521.

No. 69, Misc. MURRAY *v.* RAGEN, WARDEN. Circuit Court of McLean County, Illinois. Certiorari denied.

No. 71, Misc. DEVITO ET AL. *v.* NEW JERSEY. Court of Errors and Appeals of New Jersey. Certiorari denied. Reported below: 137 N. J. L. 302, 59 A. 2d 622.

No. 74, Misc. FLANNIGAN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 75, Misc. WASHINGTON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 76, Misc. JURCZYSZYN *v.* MICHIGAN PAROLE BOARD. Supreme Court of Michigan. Certiorari denied. Reported below: 316 Mich. 529, 25 N. W. 2d 609.

No. 77, Misc. SHELTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 83 U. S. App. D. C. 257, 169 F. 2d 665.

No. 81, Misc. PIERCE *v.* SMITH, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Reported below: 31 Wash. 2d 52, 195 P. 2d 112.

No. 82, Misc. FRAZIER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 83, Misc. SLOBODION *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 31 Cal. 2d 555, 191 P. 2d 1.

No. 85, Misc. SAXTON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 400 Ill. 257, 79 N. E. 2d 601.

No. 89, Misc. WILLIAMS ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Richard H. Chamberlain* for respondent. Reported below: 32 Cal. 2d 78, 195 P. 2d 393.

No. 91, Misc. HIBBS *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 85 Okla. Cr. ——, 190 P. 2d 156.

No. 92, Misc. YANKOWSKI *v.* NEW YORK. Court of General Sessions, New York County, New York. Certiorari denied.

No. 94, Misc. STEWART *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 95, Misc. RILEY *v.* CITIZENS NATIONAL BANK OF WACO. Court of Civil Appeals, 10th Supreme Judicial District, of Texas. Certiorari denied. *H. S. Beard* for petitioner. *Philip Edward Teeling* for respondent. Reported below: 210 S. W. 2d 224, 227.

No. 97, Misc. GATES *v.* CIRCUIT COURT OF HANCOCK COUNTY, ILLINOIS. Circuit Court of Hancock County, Illinois. Certiorari denied.

No. 105, Misc. MERRYMOOD *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 107, Misc. MONTGOMERY *v.* RAGEN, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

No. 108, Misc. GARCIA *v.* NEW YORK. County Court of Broome County, New York. Certiorari denied. Reported below: See 272 App. Div. 1084, 74 N. Y. S. 2d 563.

No. 110, Misc. VAUGHN *v.* NIERSTHEIMER, WARDEN. Circuit Court of Williamson County, Illinois. Certiorari denied.

No. 111, Misc. ROGERS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 112, Misc. MEZO *v.* NIERSTHEIMER, WARDEN. Circuit Court of Williamson County, Illinois. Certiorari denied.

No. 113, Misc. COSSENTINO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: See 273 App. Div. 901, 78 N. Y. S. 2d 925.

Rehearing Denied.

No. 49, October Term, 1947. SHAPIRO *v.* UNITED STATES, 335 U. S. 1. Rehearing denied.

No. 97, October Term, 1947. UNITED STATES *v.* HOFFMAN, 335 U. S. 77. Rehearing denied.

No. 74, October Term, 1947. POWNALL ET AL. *v.* UNITED STATES, 334 U. S. 742. Rehearing denied.

No. 95, October Term, 1947. ALEXANDER WOOL COMBING CO. *v.* UNITED STATES, 334 U. S. 742. Rehearing denied.

No. 415, October Term, 1947. TOOMER ET AL. *v.* WITSELL ET AL., 334 U. S. 385. Rehearing denied.

No. 432, October Term, 1947. UNITED STATES *v.* ZAZOVE, 334 U. S. 602. Rehearing denied.

No. 451, October Term, 1947. COMSTOCK *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL., 335 U. S. 211. Rehearing denied.

No. 541, October Term, 1947. GRYGER *v.* BURKE, WARDEN, 334 U. S. 728. Rehearing denied.

No. 584, October Term, 1947. UNITED STATES EX REL. ACKERMANN *v.* O'ROURKE, OFFICER IN CHARGE, 334 U. S. 858; and

No. 585, October Term, 1947. UNITED STATES EX REL. ACKERMANN *v.* O'ROURKE, OFFICER IN CHARGE, 334 U. S. 858. Rehearing denied.

No. 723, October Term, 1947. LUDECKE *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION, 335 U. S. 160. Rehearing denied.

No. 764, October Term, 1947. DOWNS *v.* COMMISSIONER OF INTERNAL REVENUE, 334 U. S. 832. Rehearing denied.

No. 775, October Term, 1947. EUBANKS *v.* THOMPSON, RECEIVER, 334 U. S. 854. Rehearing denied.

No. 796, October Term, 1947. MASON *v.* MERCED IRRIGATION DISTRICT, 334 U. S. 858. Rehearing denied.

No. 366, October Term, 1947. BAY RIDGE OPERATING CO., INC. *v.* AARON ET AL., 334 U. S. 446; and

No. 367, October Term, 1947. HURON STEVEDORING CORP. *v.* BLUE ET AL., 334 U. S. 446. Rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON are of opinion the petition for rehearing should be granted.

No. 470, October Term, 1947. CLARK *v.* UNITED STATES, 333 U. S. 833. Rehearing denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 489, October Term, 1947. WEST *v.* OKLAHOMA TAX COMMISSION, 334 U. S. 717. Motion to extend time to file petition for rehearing denied.

No. 532, October Term, 1947. KOTT ET AL. *v.* UNITED STATES, 333 U. S. 837. Motion for reconsideration of petition for rehearing or, in the alternative, for leave to file a second petition denied.

No. 697, October Term, 1947. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, 334 U. S. 827. Motion for leave to file a second petition for rehearing and supplement thereto denied.

No. 210, Misc., October Term, 1947. EASTER *v.* ILLINOIS, 333 U. S. 882. Rehearing denied.

No. 387, Misc., October Term, 1947. SANDERS *v.* JOHNSTON, WARDEN, 334 U. S. 829. Rehearing denied.

No. 416, Misc., October Term, 1947. MONTGOMERY ET AL. *v.* UNITED STATES, 334 U. S. 834. Rehearing denied.

No. 447, Misc., October Term, 1947. WILSON *v.* ILLINOIS, 334 U. S. 848. Rehearing denied.

No. 476, Misc., October Term, 1947. DIXON *v.* ILLINOIS, 334 U. S. 850. Rehearing denied.

No. 480, Misc., October Term, 1947. MCCANN *v.* CLARK, ATTORNEY GENERAL, 334 U. S. 842. Rehearing denied.

No. 490, Misc., October Term, 1947. IN RE BODENMILLER, 334 U. S. 831. Rehearing denied.

No. 504, Misc., October Term, 1947. MOSS *v.* HUNTER, WARDEN, 334 U. S. 860. Rehearing denied.

No. 507, Misc., October Term, 1947. TATE *v.* HEINZE, WARDEN, 334 U. S. 842. Rehearing denied.

No. 510, Misc., October Term, 1947. ODELL *v.* HUDSPETH, WARDEN, 334 U. S. 851. Rehearing denied.

No. 515, Misc., October Term, 1947. JOHNSON *v.* STEWART, WARDEN, 334 U. S. 851. Rehearing denied.

No. 518, Misc., October Term, 1947. ASBELL *v.* STEWART, WARDEN, 334 U. S. 851. Rehearing denied.

No. 540, Misc., October Term, 1947. LUCAS *v.* TEXAS, 334 U. S. 852. Rehearing denied.

No. 551, Misc., October Term, 1947. FARRELL *v.* LANAGAN, WARDEN, 334 U. S. 853. Rehearing denied.

No. 553, Misc., October Term, 1947. HALL *v.* UNITED STATES, 334 U. S. 853. Rehearing denied.

No. 554, Misc., October Term, 1947. GRAY *v.* UNITED STATES, 334 U. S. 853. Rehearing denied.

No. 559, Misc., October Term, 1947. SHOTKIN ET AL. *v.* THOMAS A. EDISON, INC., 334 U. S. 861. Rehearing denied.

No. 561, Misc., October Term, 1947. SHOTKIN *v.* KAPLAN ET AL., 334 U. S. 857. Rehearing denied.

No. 306, Misc., October Term, 1947. McGOUGH *v.* UNITED STATES, 334 U. S. 829. Petition for reconsideration of order denying rehearing denied.

OCTOBER 13, 1948.

Certiorari Denied.

No. 149, Misc. WILLIAMS *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied. Motion for a stay of execution denied. *Reginald Lyon Dyer* for petitioner. Reported below: 32 Cal. 2d 578, 197 P. 2d 341.

OCTOBER 18, 1948.

Per Curiam Decision.

No. 10. BELLASKUS *v.* CROSSMAN, OFFICER IN CHARGE, U. S. IMMIGRATION & NATURALIZATION SERVICE. Certiorari, 333 U. S. 852, to the United States Court of Appeals for the Fifth Circuit. Argued October 13, 1948. Decided October 18, 1948. *Per Curiam:* Upon suggestion of the Solicitor General and consideration of the record, the judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with directions to vacate its order discharging the rule to show cause and dismissing the petition for a writ of habeas corpus. Peti-

tioner submitted on brief *pro se*. *Philip R. Monahan* argued the cause for respondent. With him on the brief were *Solicitor General Perlman* and *Robert S. Erdahl*. Reported below: 164 F. 2d 412.

Miscellaneous Orders.

No. 32, Misc. McINTOSH *v.* PESCOR, WARDEN. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for respondent.

No. 115, Misc. WEBB *v.* ILLINOIS ET AL. Petition for injunction denied.

No. 117, Misc. BAYS *v.* HOWARD, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 136, Misc. STELLOH *v.* WARDEN OF THE WISCONSIN STATE PRISON; and

No. 146, Misc. STEPHENSON *v.* NEW JERSEY. Motions for leave to file petitions for writs of habeas corpus denied.

No. 122, Misc. IN RE VETTER;

No. 124, Misc. ECKSTEIN *v.* UNITED STATES;

No. 125, Misc. IN RE UNRECHT;

No. 126, Misc. IN RE PFEIFFER ET AL.;

No. 128, Misc. IN RE FULSCHE;

No. 133, Misc. IN RE GRILL; and

No. 145, Misc. IN RE HANS. Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S.

Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that motions for leave to file should be granted and that the cases should be set for argument forthwith. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 225. JOSEPHS *v.* COMMISSIONER OF INTERNAL REVENUE. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit dismissed on motion of counsel for the petitioner. *Floyd F. Toomey* for petitioner. Reported below: 168 F. 2d 233.

Certiorari Granted.

No. 117. RICE *v.* RICE. Supreme Court of Errors of Connecticut. Certiorari granted. *Daniel D. Morgan* for petitioner. *David M. Reilly* for respondent. Reported below: 134 Conn. 440, 58 A. 2d 523.

No. 231. UNITED STATES EX REL. HIRSHBERG *v.* MALANAPHY, COMMANDING OFFICER. C. A. 2d Cir. Certiorari granted. *John J. O'Neil* and *Harold Rosenwald* for petitioner. *Solicitor General Perlman* and *Frederick Bernays Wiener* for respondent. Reported below: 168 F. 2d 503.

No. 237. WISCONSIN ELECTRIC POWER CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Van B. Wake* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 168 F. 2d 285.

Certiorari Denied. (*See also Nos. 32 and 117 Misc., supra.*)

No. 115. GUERRINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arthur M. Becker* and *John W. Cragun* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Leavenworth Colby* and *Morton Hollander* for the United States. Reported below: 167 F. 2d 352.

No. 134. RESEARCH LABORATORIES, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Carl McFarland, Ashley Sellers* and *Kenneth L. Kimble* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl, Vincent A. Kleinfeld* and *John T. Grigsby* for the United States. Reported below: 167 F. 2d 410.

No. 150. KIRKLAND ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *E. Smythe Gambrell, W. Glen Harlan* and *Llewellyn C. Thomas* for petitioners. *Solicitor General Perlman, Assistant Attorney General Bergson, Robert W. Ginnane* and *Fred E. Strine* for the National Mediation Board et al.; and *Clarence E. Weisell, Carl McFarland* and *Ashley Sellers* for the Brotherhood of Locomotive Engineers, respondents. Reported below: 83 U. S. App. D. C. 205, 167 F. 2d 529.

No. 214. GANTT *v.* FELIPE Y CARLOS HURTADO & CIA., LTDA. Supreme Court of New York, New York County. Certiorari denied. *Edward Jerome* for petitioner. *Frank Rashap* for respondent. Reported below: See 297 N. Y. 433, 79 N. E. 2d 815.

No. 219. BURNS ET AL. *v.* CALIFORNIA. District Court of Appeal, 1st Appellate District, of California. Certiorari denied. *Simeon E. Sheffey* for petitioners. Reported below: 84 Cal. App. 2d 18, 189 P. 2d 868.

No. 221. WASHINGTON PENSION UNION *v.* STATE OF WASHINGTON EX REL. ROBINSON. Supreme Court of Washington. Certiorari denied. *Abraham J. Isserman* for petitioner. *Ford Q. Elvidge* for respondent. Reported below: 30 Wash. 2d 194, 191 P. 2d 241.

No. 229. HOUNSELL, ADMINISTRATOR, *v.* WISCONSIN DEPARTMENT OF TAXATION ET AL. Supreme Court of Wisconsin. Certiorari denied. *A. D. Sutherland* for petitioner. *Harold H. Persons,* Assistant Attorney General, for the Department of Taxation of Wisconsin, respondent. Reported below: 252 Wis. 138, 31 N. W. 2d 203.

No. 233. BRODEL *v.* WARNER BROS. PICTURES, INC. Supreme Court of California. Certiorari denied. *Max Radin* and *Wendell Lund* for petitioner. *Robert W. Perkins* and *Eugene D. Williams* for respondent. Reported below: 31 Cal. 2d 766, 192 P. 2d 949.

No. 235. GLOBE SOLVENTS CO. *v.* THE CALIFORNIA. C. A. 3d Cir. Certiorari denied. *Peter P. Zion* for petitioner. *Thomas E. Byrne, Jr.* for respondent. Reported below: 167 F. 2d 859.

No. 236. BAYUK CIGARS, INC. *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Jerome J. Rothschild* for petitioner. *Harry F. Stambaugh* for respondent. Reported below: 359 Pa. 202, 58 A. 2d 445.

No. 240. CENTRAL SURETY & INSURANCE CORP. *v.* ROYAL TRANSIT, INC. C. A. 7th Cir. Certiorari denied.

Suel O. Arnold for petitioner. *Eugene Wengert* for respondent. Reported below: 168 F. 2d 345.

No. 245. PHOENIX MUTUAL LIFE INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Owen Rall* for petitioner. *Solicitor General Perlman, Robert L. Stern, David P. Findling* and *Ruth Weyand* for respondent. Reported below: 167 F. 2d 983.

No. 246. ALLEN-BRADLEY CO. *v.* SQUARE D CO. C. A. 7th Cir. Certiorari denied. *Carlton Hill, Victor S. Beam* and *Louis Quarles* for petitioner. *J. Bernard Thiess* and *Sidney Neuman* for respondent. Reported below: 168 F. 2d 334.

No. 250. PABST ET AL. *v.* JOHN P. DANT DISTILLERY CO., INC. C. A. 6th Cir. Certiorari denied. *Herbert J. Jacobi* for petitioners. *Oldham Clarke* for respondent. Reported below: 169 F. 2d 168.

No. 254. CASCIO *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Kenneth C. Coffelt* for petitioner. *Guy E. Williams,* Attorney General of Arkansas, and *Oscar E. Ellis,* Assistant Attorney General, for respondent. Reported below: 213 Ark. 418, 210 S. W. 2d 897.

No. 256. MCCOMB, WAGE & HOUR ADMINISTRATOR, *v.* HUNT FOODS, INC. C. A. 9th Cir. Certiorari denied. *Solicitor General Perlman* and *William S. Tyson* for petitioner. *Joseph R. Harmon, H. Thomas Austern* and *Howard P. Castle* for respondent. Reported below: 167 F. 2d 905.

No. 264. STANDARD OIL CO. ET AL. *v.* DROHAN ET AL., TRUSTEES, ET AL. C. A. 7th Cir. Certiorari denied.

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Richard P. Tinkham for petitioners. *James D. Lynch* and *Harold C. Hector* for respondents. Reported below: 168 F. 2d 761.

No. 271. IN RE CARUBA. Court of Chancery of New Jersey. Certiorari denied. *Jacob L. Newman* and *Joseph Weintraub* for petitioner. *John E. Toolan* for respondent. Reported below: 142 N. J. Eq. 358, 61 A. 2d 290.

No. 232. SIMMONS *v.* FEDERAL COMMUNICATIONS COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Motion to designate "The WGAR Broadcasting Company" as a party respondent granted. Certiorari denied. *Paul M. Segal, Philip J. Hennessey, Jr.* and *Harry P. Warner* for petitioner. *Solicitor General Perlman, Benedict P. Cottone, Max Goldman* and *Richard A. Solomon* for the Federal Communications Commission; and *Louis G. Caldwell, Donald C. Beelar* and *Percy H. Russell, Jr.* for the WGAR Broadcasting Co., respondents. Reported below: 83 U. S. App. D. C. 262, 169 F. 2d 670.

No. 248. WM. SCHLUDERBERG-T. J. KURDLE CO. *v.* RECONSTRUCTION FINANCE CORPORATION. Emergency Court of Appeals. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Wilbur La Roe, Jr., Arthur L. Winn, Jr.* and *Samuel H. Moerman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for respondent. Reported below: 169 F. 2d 419.

No. 19, Misc. TUTHILL *v.* CALIFORNIA. Supreme Court of California. Motion to defer consideration denied. Certiorari denied. Reported below: 31 Cal. 2d 92, 187 P. 2d 16.

No. 67, Misc. CAVALLUCCI *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 73, Misc. ROBERTS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: See 82 Cal. App. 2d 654, 187 P. 2d 27.

No. 99, Misc. GOODMAN *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 60 A. 2d 527.

No. 100, Misc. TEDFORD *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Reported below: 31 Cal. 2d 693, 192 P. 2d 3.

No. 114, Misc. IN RE BARBER. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 196 P. 2d 695.

No. 116, Misc. MONAGHAN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 123, Misc. BYRNES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: See 84 Cal. App. 2d 64, 72, 190 P. 2d 286, 290.

No. 129, Misc. SMITH *v.* RAGEN, WARDEN. Circuit Court of Stark County, Illinois. Certiorari denied.

No. 130, Misc. DEDERER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 298 N. Y. 624, 81 N. E. 2d 359.

No. 132, Misc. REED *v.* NIERSTHEIMER, WARDEN. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 135, Misc. WILLIAMS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 137, Misc. MEYERS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 140, Misc. WILDE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: See 82 Cal. App. 2d 879, 187 P. 2d 825.

No. 141, Misc. SKENE *v.* RAGEN, WARDEN. Circuit Court of Kane County, Illinois. Certiorari denied.

No. 142, Misc. RICHARDSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 143, Misc. O'BRIEN *v.* MAYO, CUSTODIAN. Supreme Court of Florida. Certiorari denied. Reported below: 160 Fla. 776, 36 So. 2d 805.

OCTOBER 25, 1948.

Per Curiam Decisions.

No. 11. DOUBLEDAY & CO., INC. *v.* NEW YORK. Appeal from the Court of Appeals of New York. Argued October 21, 1948. Decided October 25, 1948. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case. *Whitney North Seymour* argued the cause for appellant. With him on the brief was *George G. Gallantz*. *Whitman Knapp* argued the cause for appellee. With him on the brief was *Frank S. Hogan*. *Kenneth W. Greenawalt* filed a brief

for the American Civil Liberties Union, as *amicus curiae,* urging reversal. Reported below: 297 N. Y. 687, 77 N. E. 2d 6.

No. 19. PENN *v.* CHICAGO & NORTH WESTERN RAILWAY CO. Certiorari, 333 U. S. 866, to the United States Court of Appeals for the Seventh Circuit. Argued October 14, 1948. Decided October 25, 1948. *Per Curiam:* The judgment is reversed. *Myers* v. *Reading Co.,* 331 U. S. 477. *Royal W. Irwin* argued the cause and filed a brief for petitioner. *Drennan J. Slater* argued the cause for respondent. With him on the brief was *Lowell Hastings.* Reported below: 163 F. 2d 995.

No. 319. RING *v.* MARSH, SECRETARY OF STATE OF NEW JERSEY. Appeal from the United States District Court for the District of New Jersey. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. Reported below: 78 F. Supp. 914.

No. 324. PIERCE ET AL. *v.* BOSTON; and

No. 325. MCCARTHY ET AL. *v.* BOSTON. Appeals from the Superior Court of Massachusetts, County of Suffolk. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question. *Frank W. Grinnell* and *Richard Wait* for appellants. *William H. Kerr* for appellee. Reported below: No. 324, see 322 Mass. 709, 79 N. E. 2d 713.

Miscellaneous Orders.

No. 291. MCCAFFREY *v.* ROYALL, SECRETARY OF THE ARMY; and

No. 131, Misc. MCCAFFREY *v.* ROYALL, SECRETARY OF THE ARMY. In No. 291, the petition for writ of certiorari to the United States Court of Appeals for the District of

Columbia Circuit is denied. In No. 131, Misc., the motion for leave to file petition for writ of habeas corpus is denied. *Dayton M. Harrington* and *James D. Graham, Jr.* for petitioner.

No. 9, Original. ILLINOIS *v.* INDIANA ET AL. The Third Special Report of the Special Master is approved. The amended bill of complaint is dismissed as to (1) Bates Expanded Steel Corporation, a Delaware corporation, now known as East Chicago Expanded Steel Company, pursuant to the stipulation entered into by and among the State of Illinois and the State of Indiana, City of East Chicago and Bates Expanded Steel Corporation (a Delaware corporation), now known as East Chicago Expanded Steel Company; (2) Bates Expanded Steel Corporation, an Indiana corporation, pursuant to joint motion entered into by and among the State of Illinois and the State of Indiana, the City of East Chicago and Bates Expanded Steel Corporation, an Indiana corporation; (3) Rogers Galvanizing Company, pursuant to joint motion entered into by and among the State of Illinois and the State of Indiana, the City of East Chicago and Rogers Galvanizing Company; (4) U. S. S. Lead Refinery, Inc., pursuant to joint motion entered into by and among the State of Illinois and the State of Indiana, the City of East Chicago and U. S. S. Lead Refinery, Inc. Costs against these defendants are to be taxed in accordance with the recommendations of the Special Master.

No. 9, Original. ILLINOIS *v.* INDIANA ET AL. The Third Interim Report of the Special Master dated September 7, 1948, is approved. The Court orders and directs the Special Master to continue the proceedings in accordance with the order of this Court dated February 17, 1947, 330 U. S. 799–800. The Court further orders

that the recommendation of the Special Master as to the apportionment of costs be adopted and costs for the period from September 8, 1947, to September 7, 1948, inclusive, shall be taxed as recommended in the Third Interim Report.

No. 155, Misc. IN RE ECKSTEIN. Treating the application in this case as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States*, 332 U. S. 789 (1947); *Brandt* v. *United States*, 333 U. S. 836 (1948); *In re Eichel*, 333 U. S. 865 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that motion for leave to file should be granted and that the case should be set for argument forthwith. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

Certiorari Granted.

No. 226. SECURITIES & EXCHANGE COMMISSION *v.* CENTRAL-ILLINOIS SECURITIES CORP. ET AL.;

No. 227. STREETER ET AL. *v.* CENTRAL-ILLINOIS SECURITIES CORP. ET AL.;

No. 243. HOME INSURANCE CO. ET AL. *v.* CENTRAL-ILLINOIS SECURITIES CORP. ET AL.; and

No. 266. CENTRAL-ILLINOIS SECURITIES CORP. ET AL. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Perlman* and *Roger S. Foster* for the Securities & Exchange Commission, petitioner in No. 226 and respondent in No. 266. *Lawrence R. Condon* and *Milton Maurer* for Streeter et

al., petitioners in No. 227 and respondents in No. 266. *Francis H. Scheetz* for petitioners in No. 243. *Alfred Berman, Philip W. Amran* and *Abraham Shamos* for the Central-Illinois Securities Corp. et al., petitioners in No. 266 and respondents in Nos. 226, 227 and 243. *Louis Boehm* for White et al., respondents in Nos. 226, 227 and 243. *W. E. Tucker* and *Paul D. Miller* for the Engineers Public Service Co., respondent in Nos. 226 and 227. *Louis Boehm* filed a brief for White et al., as *amici curiae,* supporting petitioners in No. 266. Reported below: 168 F. 2d 722.

No. 228. NYE & NISSEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Joseph B. Keenan, Robert T. Murphy* and *Harold C. Faulkner* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 168 F. 2d 846.

No. 234. REYNOLDS, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO. Supreme Court of Alabama. Certiorari granted. *J. Kirkman Jackson* for petitioner. *Charles Cook Howell* and *Peyton D. Bibb* for respondent. Reported below: 251 Ala. 27, 36 So. 2d 102.

Certiorari Denied. (*See also No. 291, supra.*)

No. 111. ANCKER ET AL. *v.* CALIFORNIA. Appellate Department of the Superior Court in and for the County of Los Angeles, California. Certiorari denied. *Abraham J. Isserman* for petitioners. *Ray L. Chesebro* for respondent.

No. 204. CITY OF VERNON ET AL. *v.* CALIFORNIA; and
No. 205. CULVER CITY ET AL. *v.* CALIFORNIA. District Court of Appeal, 2d Appellate District, of California.

Certiorari denied. *John B. Milliken* for petitioners in No. 204. *M. Tellefson* and *Stuart M. Salisbury* for petitioners in No. 205. *Fred N. Howser,* Attorney General of California, and *Walter L. Bowers,* Assistant Attorney General, for respondent. Reported below: 83 Cal. App. 2d 627, 189 P. 2d 489.

No. 241. BLANC *v.* SPARTAN TOOL CO. C. A. 7th Cir. Certiorari denied. *Gordon F. Hook* for petitioner. *Arthur A. Olson* and *Thorley von Holst* for respondent. Reported below: 168 F. 2d 296.

No. 252. CHAPMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Michael F. Mulcahy* and *Henry W. Dieringer* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 168 F. 2d 997.

No. 261. REVERE LAND CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Earl F. Reed* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Irving I. Axelrad* for respondent. Reported below: 169 F. 2d 469.

No. 262. MONTANA-DAKOTA UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. *John C. Benson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Melvin Richter, Lambert McAllister* and *S. W. Jensch* for the Federal Power Commission; and *L. E. Melrin* and *Charles E. Nieman* for the Mondakota Gas Co., respondents. Reported below: 169 F. 2d 392.

No. 274. PASADENA RESEARCH LABORATORIES, INC. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

R. Welton Whann and *Robert M. McManigal* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Josephine H. Klein* for the United States. Reported below: 169 F. 2d 375.

No. 281. W. E. Wright Co. *v.* McComb, Wage & Hour Administrator. C. A. 6th Cir. Certiorari denied. *Edwin W. Brouse* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 168 F. 2d 40.

No. 282. St. Louis Amusement Co. et al. *v.* Paramount Film Distributing Corp. et al. C. A. 8th Cir. Certiorari denied. *Russell Hardy* and *Smith W. Brookhart* for petitioners. *Whitney North Seymour* and *Albert C. Bickford* for the Paramount Film Distributing Corp. et al.; and *S. Mayner Wallace* and *Edwin Foster Blair* for the American Arbitration Assn. et al., respondents. Reported below: 168 F. 2d 988.

No. 290. Minsch et al., Intervenors, et al. *v.* Bailey et al. C. A. 1st Cir. Certiorari denied. *Robert H. Davison, Lewis L. Wadsworth, Jr.* and *Charles B. Rugg* for petitioners. *George Trosk* for respondents. Reported below: 168 F. 2d 635.

No. 251. Panhandle Eastern Pipe Line Co. *v.* Federal Power Commission et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John S. L. Yost, D. H. Culton, John W. Scott* and *Harry S. Littman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Melvin Richter* and *Louis W. McKernan* for the Federal Power Commission; and *Donald R. Richberg, Carl I. Wheat, Charles V. Shannon, Stanley M. Morley, Eugene F. Black,* Attorney General of Michigan, and

Raymond J. Kelly for the Michigan-Wisconsin Pipe Line Co. et al., respondents. Reported below: 169 F. 2d 881.

No. 257. TEXAS *v.* BROWN ET AL. C. A. 7th Cir. Motion of the Chicago, Rock Island & Pacific Railroad Co. for leave to intervene as a party respondent granted. Certiorari denied. *Price Daniel,* Attorney General of Texas, for petitioner. *Kenneth F. Burgess* for Brown et al.; and *W. F. Peter* for the Chicago, Rock Island & Pacific Railroad Co., respondents. Reported below: 168 F. 2d 587.

No. 139, Misc. BOLDS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois, and C. A. 7th Cir. Certiorari denied.

No. 144, Misc. DAY *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 151, Misc. MEYERS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 22, Misc. October Term, 1947. LOWE *v.* UNITED STATES, 332 U. S. 777. Third petition for rehearing denied.

NOVEMBER 8, 1948.

Miscellaneous Orders.

No. 329. FILBEN MANUFACTURING CO., INC. ET AL. *v.* ROCK-OLA MANUFACTURING CORP. ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit dismissed on motion of counsel

for the petitioners. *Paul J. Thompson, Ben W. Heineman* and *Max Swiren* for petitioners. Reported below: 168 F. 2d 919.

No. 143. KRULEWITCH *v.* UNITED STATES. The motion to enlarge the scope of review is denied. *Jacob W. Friedman* for petitioner.

Nos. 270 and 428, October Term, 1947. PARKER *v.* ILLINOIS. Petition denied.

No. 138, Misc. GIBSON *v.* BURKE;
No. 167, Misc. RUTHVEN *v.* OVERHOLSER; and
No. 169, Misc. MOORE *v.* NEW JERSEY. Motions for leave to file petitions for writs of habeas corpus denied.

No. 153, Misc. SMITH *v.* HOWARD, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 156, Misc. IN RE HEIM. Treating the application in this case as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that motion for leave to file should be granted and that the case should be set for argument forthwith. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

Certiorari Granted.

No. 253. UNITED STATES *v.* PENN FOUNDRY & MANUFACTURING CO., INC. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Robert H. McNeill, David G. Bress, T. Bruce Fuller* and *Sheldon E. Bernstein* for respondent. Reported below: 110 Ct. Cl. 374, 75 F. Supp. 319.

No. 258. NATIONAL LABOR RELATIONS BOARD *v.* PITTSBURGH STEAMSHIP CO. C. A. 6th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Frederick L. Leckie* for respondent. Reported below: 167 F. 2d 126.

No. 298. DEFENSE SUPPLIES CORP. ET AL. *v.* LAWRENCE WAREHOUSE CO. ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Perlman* for petitioners. *W. F. Williamson* and *W. R. Wallace, Jr.* for the Lawrence Warehouse Co.; and *Morris Lavine* for the Capitol Chevrolet Co., respondents. Reported below: 168 F. 2d 199.

No. 255. EISLER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *David Rein, Abraham J. Isserman, Carol King* and *Joseph Forer* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Harold D. Cohen* for the United States. *Robert W. Kenny* filed a brief for the National Lawyers Guild, as *amicus curiae,* supporting the petition. Reported below: 83 U. S. App. D. C. 315, 170 F. 2d 273.

Certiorari Denied. (*See also No. 153, Misc., supra.*)

No. 269. RULLÁN *v.* BUSCAGLIA, TREASURER OF PUERTO RICO. C. A. 1st Cir. Certiorari denied. *Francis A. Ma-*

hony and *Fred W. Llewellyn* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *I. Henry Kutz* for respondent. Reported below: 168 F. 2d 401.

No. 273. AKERS MOTOR LINES, INC. *v.* NEWMAN ET AL. C. A. 5th Cir. Certiorari denied. *M. Neil Andrews* and *A. Walton Nall* for petitioner. *Samuel D. Hewlett* for respondents. Reported below: 168 F. 2d 1012.

No. 278. COMMERCIAL CASUALTY INSURANCE CO. *v.* ROBERTS. C. A. 6th Cir. Certiorari denied. *A. Shelby Winstead* for petitioner. *James Park* for respondent. Reported below: 168 F. 2d 23.

No. 284. WHETSTONE *v.* STATE OF WASHINGTON. Supreme Court of Washington. Certiorari denied. *Melville Monheimer* for petitioner. Reported below: 30 Wash. 2d 301, 191 P. 2d 818.

No. 286. KELLER *v.* KELLER. Supreme Court of Missouri. Certiorari denied. *J. M. Feigenbaum* for petitioner. Reported below: 212 S. W. 2d 789.

No. 288. STRAUSS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Roswell Magill* and *George G. Tyler* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Helen Goodner* for respondent. Reported below: 168 F. 2d 441.

No. 289. LANSDEN ET AL. *v.* HART, U. S. ATTORNEY, ET AL. C. A. 7th Cir. Certiorari denied. *John F. Donelan* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for Hart et al., respondents. Reported below: 168 F. 2d 409.

No. 296. ANSELMO *v.* CONNECTICUT (REPRESENTED BY COX, HIGHWAY COMMISSIONER). Supreme Court of Errors of Connecticut. Certiorari denied. *William J. Galvin, Jr.* for petitioner. Reported below: 135 Conn. 78, 60 A. 2d 767.

No. 305. GALION METALLIC VAULT CO. *v.* EDWARD G. BUDD MANUFACTURING CO. C. A. 3d Cir. Certiorari denied. *H. A. Toulmin, Jr., Clayton E. Crafts* and *H. H. Brown* for petitioner. *Charles H. Howson* and *Dexter N. Shaw* for respondent. Reported below: 169 F. 2d 72.

No. 306. BARNES-MANLEY WET WASH LAUNDRY CO. ET AL. *v.* AUTOMOBILE INSURANCE CO. C. A. 10th Cir. Certiorari denied. *William E. Leahy* and *William J. Hughes, Jr.* for petitioners. Reported below: 168 F. 2d 381.

No. 308. ASSOCIATED TELEPHONE & TELEGRAPH CO. ET AL. *v.* FEDERAL TELEPHONE & RADIO CORP. C. A. 3d Cir. Certiorari denied. *Casper W. Ooms, Harry B. Sutter* and *Charles M. Candy* for petitioners. *Paul Kolisch, Walter A. Darby* and *Edward D. Phinney* for respondent. Reported below: 169 F. 2d 1012.

No. 309. YORK CORPORATION *v.* REFRIGERATION ENGINEERING, INC. C. A. 9th Cir. Certiorari denied. *Alexander C. Neave* and *Clarence D. Kerr* for petitioner. *Leonard S. Lyon* for respondent. Reported below: 168 F. 2d 896.

No. 310. AMERICAN BARGE LINE CO. *v.* MURPHY. C. A. 3d Cir. Certiorari denied. *Frederick L. Leckie* for petitioner. Reported below: 169 F. 2d 61.

No. 314. UNITED STATES *v.* CAL-BAY CORPORATION ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General*

Perlman for the United States. *A. J. Scampini* and *Walter E. Hettman* for respondents. Reported below: 169 F. 2d 15.

No. 315. CHAPMAN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Earl A. Brown* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *George S. Swarth* for the United States. Reported below: 169 F. 2d 641.

No. 338. GROSS INCOME TAX DIVISION *v.* STRAUSS. Supreme Court of Indiana. Certiorari denied. *Cleon H. Foust,* Attorney General of Indiana, and *John J. McShane,* Deputy Attorney General, for petitioner. *Donald R. Mote* for respondent. Reported below: 226 Ind. ——, 79 N. E. 2d 103.

No. 339. GROSS INCOME TAX DIVISION *v.* QUICK. Supreme Court of Indiana. Certiorari denied. *Cleon H. Foust,* Attorney General of Indiana, and *John J. McShane,* Deputy Attorney General, for petitioner. *Albert Harvey Cole* for respondent. Reported below: 226 Ind. ——, 78 N. E. 2d 871.

No. 342. ARSTEIN ET AL. *v.* ROBERT REIS & CO. Supreme Court of New York, New York County. Certiorari denied. *Lloyd B. Kanter* for petitioners. *Ethelbert Warfield* for respondent. Reported below: See 273 App. Div. 963, 79 N. Y. S. 2d 314.

No. 344. KESSLER *v.* MCGLONE, EXECUTOR, ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *Marcus Borchardt* for petitioner. *John A. K. Donovan* and *Cornelius H. Doherty* for respondents. Reported below: 187 Va. lxii.

No. 349. SOUTHEASTERN GREYHOUND LINES ET AL. *v.* McCAFFERTY. C. A. 6th Cir. Certiorari denied. *R. W. Keenon* for petitioners. *Cecil C. Wilson* for respondent. Reported below: 169 F. 2d 1.

No. 280. LOCKE MACHINE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Walker H. Nye* and *Thomas V. Koykka* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Harry Baum* for respondent. Reported below: 168 F. 2d 21.

No. 307. ADKINS ET AL. *v.* HAMILTON, TAX COLLECTOR. Supreme Court of Alabama. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Hugh A. Locke* for petitioners. *A. A. Carmichael,* Attorney General of Alabama, for respondent. Reported below: 250 Ala. 557, 35 So. 2d 183.

No. 311. McGOWAN *v.* J. H. WINCHESTER & CO., INC.; and

No. 312. BURO *v.* AMERICAN PETROLEUM TRANSPORT CORP. ET AL. Petition for an extension of time *nunc pro tunc* to file petition for writs of certiorari denied. Petition for writs of certiorari to the United States Court of Appeals for the Second Circuit denied for the reason that application therefor was not made within the time provided by law. *Jacob Rassner, Nathan Baker* and *Thomas O'Rourke Gallagher* for petitioners. *John L. Quinlan* for respondents. Reported below: 168 F. 2d 924.

No. 334. LAWSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit.

Certiorari denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Robert W. Kenny, Bartley C. Crum* and *Martin Popper* for petitioner. *Solicitor General Perlman* for the United States. *G. Leslie Field* and *George W. Crockett, Jr.* filed a brief for the National Lawyers Guild, as *amicus curiae,* supporting the petition.

No. 3, Misc. JONES *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, *William C. Wines* and *James C. Murray,* Assistant Attorneys General, for respondent.

No. 98, Misc. DONNELL *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 147, Misc. MAIKISCH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Charles V. Halley, Jr.* for petitioner. Reported below: 298 N. Y. 548, 81 N. E. 2d 94.

No. 150, Misc. FOSTER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 152, Misc. LALLY *v.* NEW YORK. Supreme Court of New York, County of Orleans. Certiorari denied. Reported below: See 273 App. Div. 840, 77 N. Y. S. 2d 795.

No. 157, Misc. MITCHELL *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 158, Misc. HOLT *v.* BENSON, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 159, Misc. WILLIAMS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 160, Misc. DAVIS *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 161, Misc. WILLIAMS *v.* NIERSTHEIMER, WARDEN. Circuit Court of Pike County, Illinois. Certiorari denied.

No. 163, Misc. AVELINO *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: See 81 Cal. App. 2d 934, 185 P. 2d 361.

No. 164, Misc. PRYOR *v.* CALIFORNIA. District Court of Appeal, 1st Appellate District, of California. Certiorari denied. Reported below: 87 Cal. App. 2d 352, 196 P. 2d 948.

No. 165, Misc. EVANS *v.* ILLINOIS. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 168, Misc. SEMBLY *v.* SWENSON. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 60 A. 2d 526.

No. 174, Misc. SKINNER *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 175, Misc. WEHR *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 182, Misc. THOMPSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 697, October Term, 1947. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, 334 U. S. 827. Motion for leave to file a third petition for rehearing denied.

Nos. 103 and 104. LOBAIDO *v.* MICHIGAN, *ante,* p. 829. Rehearing denied.

No. 123. CARTER CARBURETOR CORP. *v.* KINGSLAND, COMMISSIONER OF PATENTS, *ante,* p. 819. Rehearing denied.

No. 141. BORAK *v.* UNITED STATES, *ante,* p. 821. Rehearing denied.

No. 183. REMINGTON RAND, INC. *v.* ROYAL TYPEWRITER CO., INC., *ante,* p. 825. Rehearing denied.

No. 265. NORTH AMERICAN CO. *v.* KOERNER, JUDGE, *ante,* p. 803. Motion for leave to file petition for rehearing out of time under Rule 33 denied. Motion for a stay of the mandate also denied.

No. 771, October Term, 1943. TELFIAN *v.* UNITED STATES, 322 U. S. 737;

No. 1185, October Term, 1944. TELFIAN *v.* SANFORD, WARDEN, 325 U. S. 869; and

No. 63, Misc., October Term, 1947. TELFIAN *v.* SANFORD, WARDEN, 332 U. S. 781. Motion for leave to file petition for rehearing denied.

No. 519, Misc., October Term, 1947. HARRIS *v.* CITY OF NEW YORK, 334 U. S. 836. Second petition for rehearing denied.

No. 42, Misc. EATON *v.* RAGEN, WARDEN, *ante,* p. 832. Rehearing denied.

No. 79, Misc. EX PARTE WHISTLER, *ante*, p. 805. Rehearing denied.

No. 95, Misc. RILEY *v.* CITIZENS NATIONAL BANK OF WACO, *ante*, p. 835. Rehearing denied.

No. 136, Misc. STELLOH *v.* WARDEN OF THE WISCONSIN STATE PRISON, *ante*, p. 841. Rehearing denied.

NOVEMBER 15, 1948.

Per Curiam Decisions.

No. 206. MURPHEY ET AL. *v.* REED ET AL., DOING BUSINESS AS M. T. REED CONSTRUCTION CO. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgments below are vacated and the case remanded to the District Court with instructions to dismiss those causes of action involving solely construction work, and to reconsider the remaining causes of action in the light of the decision of this Court in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249. MR. JUSTICE RUTLEDGE is of the opinion that the case as a whole should be remanded to the District Court for further proceedings in view of the decision of this Court in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249. Dissenting: MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY. *Webb M. Mize* for petitioners. *Charles S. Corben* for respondents. Reported below: 168 F. 2d 257.

No. 116. FOGEL *v.* UNITED STATES. Certiorari, *ante*, p. 811, to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* Upon consideration of the Government's confession of error and the record, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to va-

cate its order denying the motion for a new trial and to grant a new trial. *Maury Hughes* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 167 F. 2d 763.

No. 362. MASICH *v.* UNITED STATES SMELTING, REFINING & MINING CO. ET AL. Appeal from the Supreme Court of Utah. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. *Clarence M. Beck, William A. Hilton* and *Elias Hansen* for appellant. *Paul H. Ray* and *Charles A. Horsky* for appellees. Reported below: —— Utah ——, 191 P. 2d 612.

Miscellaneous Order.

No. 38. LA CROSSE TELEPHONE CORP. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL.; and

No. 39. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B–953, A. F. OF L. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL. Motion of Communications Workers of America, Division 23, to be made a party of record and to participate in oral argument denied. Leave is granted to file a brief as *amicus curiae*. *Donald J. Martin* for the Communications Workers of America. Reported below: 251 Wis. 583, 30 N. W. 2d 241.

Certiorari Granted. (*See also No. 206, supra.*)

No. 41, Misc. GRIFFIN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States.

No. 127, Misc. GIBBS *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari granted.

Certiorari Denied.

No. 260. UNITED STATES EX REL. EICHENLAUB *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION. C. A. 2d Cir. Certiorari denied. *Charles E. Wallington* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Josephine H. Klein* for respondent. Reported below: 167 F. 2d 659.

No. 277. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Carl McFarland, Ashley Sellers* and *Kenneth L. Kimble* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Morton Liftin* for the United States. Reported below: 84 U. S. App. D. C. —, 174 F. 2d 160.

No. 285. FIRST STATE BANK OF STRATFORD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Sterling E. Kinney* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Melva M. Graney* for respondent. Reported below: 168 F. 2d 1004.

No. 293. HICKEY & CO. ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Allen Wight* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Newell A. Clapp, Paul A. Sweeney* and *Oscar H. Davis* for respondents. Reported below: 168 F. 2d 752.

No. 316. MULCAHY, TRUSTEE, *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. C. A. 2d Cir.

Certiorari denied. *Paul E. Troy* for petitioner. *Hermon J. Wells* for the New York, New Haven & Hartford Railroad Co., respondent. Reported below: 169 F. 2d 337.

No. 340. CINGRIGRANI ET AL. *v.* B. H. HUBBERT & SON, INC. C. A. 4th Cir. Certiorari denied. *I. Duke Avnet* for petitioners. *John H. Hessey* for respondent. Reported below: 168 F. 2d 993.

No. 345. HOUSTON, COUNTY TREASURER, *v.* MCCORMACK ET AL., TRUSTEES OF RECLAMATION DISTRICT NO. 1000. District Court of Appeal, 3d Appellate District, of California. Certiorari denied. *George Herrington* for petitioner. *Stephen W. Downey* and *C. F. Metteer* for respondents. Reported below: 84 Cal. App. 2d 665, 191 P. 2d 569.

No. 173, Misc. BOYLE *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 400 Ill. 571, 81 N. E. 2d 444.

No. 181, Misc. SPICHER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

Rehearing Denied.

No. 142. CAMPA *v.* UNITED STATES, *ante*, p. 821. Rehearing denied.

No. 162. EXCEL AUTO RADIATOR CO. *v.* BISHOP & BABCOCK MANUFACTURING CO., *ante*, p. 823. Rehearing denied.

No. 177. MASON *v.* PARADISE IRRIGATION DISTRICT, *ante*, p. 825. Rehearing denied.

NOVEMBER 22, 1948.

Miscellaneous Orders.

No. 188, Misc. HOWELL *v.* JONES, WARDEN;
No. 191, Misc. PACK *v.* PERRY, SUPERINTENDENT; and
No. 192, Misc. MAHONEY *v.* CHAPMAN, SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 197, Misc. KADANS *v.* SULLIVAN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Joseph Kadans* for petitioner.

No. 422. UNITED STATES *v.* WATERS. Appeal from the United States District Court for the District of Columbia. Dismissed on motion of counsel for the appellant. *Solicitor General Perlman* for the United States. Reported below: 73 F. Supp. 72.

Certiorari Granted. (*See also No. 1, Misc., supra, p. 331.*)

No. 267. FARRELL *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari granted. *Silas Blake Axtell* and *Myron Scott* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade, Leavenworth Colby* and *Alvin O. West* for the United States, respondent. Reported below: 167 F. 2d 781.

No. 333. AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 727 *v.* CAMPBELL ET AL. C. A. 9th Cir. Certiorari granted. *Maurice J. Hindin* for petitioner. *Solicitor General Perlman* for Campbell et al.; and *Robert H. Canan* for the Lockheed Aircraft Corp., respondents. Reported below: 169 F. 2d 252.

No. 351. COSMOPOLITAN SHIPPING CO., INC. *v.* McALLISTER. C. A. 2d Cir.; and

No. 360. FINK *v.* SHEPARD STEAMSHIP CO. Supreme Court of Oregon. Certiorari granted. *Solicitor General Perlman* for petitioner in No. 351 and respondent in No. 360. *B. A. Green* and *Edwin D. Hicks* for petitioner in No. 360. *Bertram J. Dembo* and *Jacob Rassner* for respondent in No. 351. Reported below: No. 351, 169 F. 2d 4; No. 360, 183 Ore. 373, 192 P. 2d 258.

No. 118, Misc. ZIMMERMAN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari granted. *J. Cookman Boyd, Jr.* for petitioner. *Hall Hammond,* Attorney General of Maryland, and *Richard W. Case,* Assistant Attorney General, for respondent. Reported below: —— Md. ——, 59 A. 2d 675.

No. 162, Misc. GAYNOR *v.* AGWILINES, INC. C. A. 3d Cir. Certiorari granted. *Abraham E. Freedman* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 169 F. 2d 612.

Certiorari Denied.

No. 318. SOUTH BUFFALO RAILWAY CO. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Bruce Bromley* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 168 F. 2d 948.

No. 326. COLONELL *v.* GOODMAN ET AL. C. A. 3d Cir. Certiorari denied. *Thomas C. Egan* for petitioner. *Bernard G. Segal* and *Irving R. Segal* for respondents. Reported below: 169 F. 2d 275.

No. 328. KANSAS CITY TERMINAL RAILWAY CO. *v.* THOMPSON, TRUSTEE, ET AL. Supreme Court of Missouri. Certiorari denied. *Samuel W. Sawyer* and *Horace F.*

Blackwell, Jr. for petitioner. *M. G. Roberts* and *Clifford B. Kimberly* for Thompson, Trustee; and *Edwin D. Franey* for Graham, Administratrix, respondents. Reported below: 357 Mo. 1133, 212 S. W. 2d 770.

No. 337. DARR ET AL. *v.* MUTUAL LIFE INSURANCE CO. C. A. 2d Cir. Certiorari denied. *Frederick E. Weinberg* for petitioners. *Joseph V. Lane, Jr.* for respondent. Reported below: 169 F. 2d 262.

No. 341. UNITED FUNDS, INC. *v.* NEE, COLLECTOR OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Daniel L. Brenner* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 169 F. 2d 33.

No. 346. ESTATE OF JOSEPHS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Floyd F. Toomey* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Morton K. Rothschild* for respondent. Reported below: 168 F. 2d 233.

No. 350. LA SALLE-MADISON HOTEL CO. *v.* DENHAM. C. A. 7th Cir. Certiorari denied. *Arthur Dixon* for petitioner. *David J. Kadyk, L. Duncan Lloyd* and *John L. Davidson* for respondent. Reported below: 168 F. 2d 576.

No. 354. R. W. CLAXTON, INC. *v.* SCHAFF ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James M. Earnest* and *Albert F. Beasley* for petitioner. *Caesar L. Aiello* and *Llewellyn C. Thomas* for respondents. Reported below: 83 U. S. App. D. C. 271, 169 F. 2d 303.

No. 358. OWENS *v.* CURTISS CANDY CO. C. A. 8th Cir. Certiorari denied. *Martin J. O'Donnell* for peti-

tioner. *Irwin N. Walker* for respondent. Reported below: 169 F. 2d 179.

No. 363. BOYLAN ET AL. *v.* DETRIO ET AL. C. A. 5th Cir. Certiorari denied. *Sol M. Selig* for petitioners. *Webb M. Mize* and *R. W. Thompson, Jr.* for respondents. Reported below: 169 F. 2d 77.

No. 268. WEBER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 168 F. 2d 521.

No. 53, Misc. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 168 F. 2d 1003.

No. 78, Misc. HARRIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph A. McMenamin* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 83 U. S. App. D. C. 348, 169 F. 2d 887.

No. 90, Misc. IN RE ELAM. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *Irvin Fane* and *John B. Pew* for the Circuit Bar Committee, respondent. Reported below: 357 Mo. 922, 211 S. W. 2d 710.

No. 148, Misc. THIEL *v.* SOUTHERN PACIFIC CO. C. A. 9th Cir. Certiorari denied. *Allen Spivock* for petitioner. *Arthur B. Dunne* for respondent. Reported below: 169 F. 2d 30.

No. 166, Misc. WALLACE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 189, Misc. DANIELS *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 190, Misc. PRICE *v.* RAGEN, WARDEN. Circuit Court of McLean County, Illinois. Certiorari denied.

No. 195, Misc. BRABSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: See 284 N. Y. 381, 31 N. E. 2d 496.

No. 201, Misc. MACBLAIN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 203, Misc. MARTIN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 50, Misc. MEREDITH *v.* GOUGH, ACTING WARDEN. C. A. 5th Cir. Hiatt, Warden, substituted as party respondent. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* and *Robert S. Erdahl* for respondent. Reported below: 168 F. 2d 193.

Rehearing Denied.

No. 19. PENN *v.* CHICAGO & NORTH WESTERN RAILWAY CO., *ante*, p. 849. Rehearing denied.

No. 233. BRODEL *v.* WARNER BROS. PICTURES, INC., *ante*, p. 844. Rehearing denied.

No. 241. BLANC *v.* SPARTAN TOOL CO., *ante*, p. 853. Rehearing denied.

DECEMBER 2, 1948.

Certiorari Denied.

No. 244, Misc. WHEELER *v.* REID, SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Motion for reconsideration of the order denying stay of execution also denied. *James J. Laughlin* for petitioner.

DECEMBER 6, 1948.

Per Curiam Decisions.

No. 263. WIXMAN *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals affirming the judgment of the District Court is reversed for the reason that there is insufficient evidence in the record to support it. The judgment of the District Court is vacated and the case is remanded to that court for further proceedings. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Perlman* filed a memorandum for the United States suggesting that certiorari issue and that, without further argument, the judgment below be reversed and the cause remanded to the District Court. Briefs of *amici curiae* supporting the petition were filed by *Charles A. Horsky, Julien Cornell, Osmond K. Fraenkel* and *Arthur Garfield Hays* for the American Civil Liberties Union; *Robert W. Kenney* for the National Lawyers Guild et al.; and *Isaac Pacht, Clore Warne, Irving Hill, Shad Polier, William Maslow* and *Joseph B. Robison* for the American Jewish Congress. Reported below: 167 F. 2d 808.

No. 369. BETHLEHEM STEEL CO. *v.* MOORES. Appeal from the Supreme Judicial Court and the Superior Court

of the County of Suffolk, Massachusetts. *Per Curiam:* The judgment is affirmed. *Davis* v. *Department of Labor,* 317 U. S. 249. *Wm. Dwight Whitney* for appellant. *Samuel B. Horovitz* for appellee. Reported below: See 323 Mass. 162, 80 N. E. 2d 478.

No. 393. WISNER *v.* KAMINSKI. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Ralph Atkinson* for appellant. *Henderson H. Carson* for appellee. Reported below: See 149 Ohio St. 488, 79 N. E. 2d 327.

No. 397. BRADY TRANSFER & STORAGE CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of Iowa. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475. *Rex H. Fowler, John S. Burchmore, Robert N. Burchmore* and *Nuel D. Belnap* for the Brady Transfer & Storage Co.; and *James E. Wilson* for the Irregular Route Common Carrier Conference of the American Trucking Assns., Inc., appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States et al., appellees. Reported below: 80 F. Supp. 110.

No. 400. HALL *v.* VIRGINIA. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY are of opinion that probable jurisdiction should be noted. *Hayden C. Covington* and *Thos. H. Stone* for appellant. *J. Lindsay Almond, Jr.* for appellee. Reported below: 188 Va. 72, 49 S. E. 2d 369.

Miscellaneous Orders.

No. 239, Misc. HIROTA *v.* MACARTHUR ET AL.;
No. 240, Misc. DOHIHARA *v.* MACARTHUR ET AL.; and
No. 248, Misc. KIDO ET AL. *v.* MACARTHUR ET AL.
The Court desires to hear argument upon the questions presented by the motions for leave to file petitions for writs of habeas corpus. Action upon the motions for leave to file will be withheld meanwhile, and the motions are set down for oral argument on Thursday, December 16, 1948. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2. MR. JUSTICE JACKSON has filed a memorandum stating his views. *David F. Smith* for petitioners in Nos. 239 and 240. *George Yamaoka* was also of counsel in No. 239. *John W. Crandall* and *Ben Bruce Blakeney* for petitioners in No. 248.

MR. JUSTICE JACKSON:

Four members of this Court feel that the Japanese convicted of war crimes should have some form of relief, at least tentative, from this Court. The votes of these are not enough to grant it but, if I refrain from voting, they constitute one-half of the sitting Court. As I understand it, these Justices do not commit themselves as to whether there is any constitutional power in this Court to entertain these proceedings but only feel that they would like to hear argument to enlighten them in reaching a determination of that issue. They feel it so strongly that they not only favored grant of relief in conference, but, having failed, announce their dissent to the public—an interested section of which consists of our late enemies and allies in the Orient. This perhaps is all that these Justices could do consistently with the course that

they have already taken in several German cases.[1] This is their right, and I point it out not to question the right but as one of the facts which confronts me in deciding my own course.

On the other hand, four other Justices are convinced, from their study of the question, that there is no constitutional jurisdiction whatever in this Court over the subject matter. To interfere and assume to review it would in that view constitute an unwarranted interference with delicate affairs that are in no way committed to the jurisdiction of this Court. These four Justices having satisfied themselves that this Court is without lawful power, have consistently refused to take action which would usurp it, even tentatively, in the German cases. Of course, they could not consistently, with equal justice under law, apply a different jurisdictional rule to these cases than they have to those of the Germans.

By reason of nonparticipation in the German cases, for reasons which are obvious, I remain uncommitted on the jurisdictional issues. My nonparticipation has prevented their resolution heretofore and I must decide whether another nonparticipation will prevent it now. The issue transcends the particular litigation.

This public division of the Court, equal if I do not participate, puts the United States before the world, and

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[1] See, *e. g.*, *Milch* v. *United States*, 332 U. S. 789; *Brandt* v. *United States*, 333 U. S. 836; *Brack* v. *United States*, 333 U. S. 836; *Gebhardt* v. *United States*, 333 U. S. 836; *Hoven* v. *United States*, 333 U. S. 836; *Mrugowsky* v. *United States*, 333 U. S. 836; *Sievers* v. *United States*, 333 U. S. 836; *Fischer* v. *United States*, 333 U. S. 836; *Genzken* v. *United States*, 333 U. S. 836; *Handloser* v. *United States*, 333 U. S. 836; *Rose* v. *United States*, 333 U. S. 836; *Schroeder* v. *United States*, 333 U. S. 836; *Becker-Freyseng* v. *United States*, 333 U. S. 836; *Everett* v. *Truman*, 334 U. S. 824; *In re Ehlen*, 334 U. S. 836; *In re Girke*, 334 U. S. 836; *In re Gronwald*, 334 U. S. 857; *In re Wentzel*, 335 U. S. 805; *In re Hans*, 335 U. S. 841; *In re Heim*, 335 U. S. 856; *In re Eckstein*, 335 U. S. 851.

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particularly before Oriental peoples, in this awkward position: Having major responsibility for the capture of these Japanese prisoners, it also has considerable responsibility for their fate. If their plea ends in stalemate in this Court, the authorities have no course but to execute sentences which half of this Court tells the world are on so doubtful a legal foundation that they favor some kind of provisional relief and fuller review. The fact that such a number of men so placed in the United States are of that opinion would for all time be capitalized in the Orient, if not elsewhere, to impeach the good faith and to discredit the justice of this country, and to comfort its critics and enemies.

The other possible course is to assert tentatively a jurisdiction in this Court to stay and order hearings in these proceedings. This is likewise bound to embarrass the United States. On American initiative, under direction of the President as Commander-in-Chief, this country invited our Pacific allies, on foreign soil, to cooperate in conducting a grand inquest into the alleged crimes, including the war guilt, of these defendants. Whatever its real legal nature, it bears the outward appearance of an international enterprise, undertaken on our part under the war powers and control of foreign affairs vested in the Executive. For this Court now to call up these cases for judicial review under exclusively American law can only be regarded as a warning to our associates in the trials that no commitment of the President or of the military authorities, even in such matters as these, has finality or validity under our form of government until it has the approval of this Court. And since the Court's approval or disapproval cannot be known until after the event—usually long after—it would substantially handicap our country in asking other nations to rely upon the word or act of the President in affairs which only he is competent to conduct.

In this equal division each side's position is taken after long and frequent consideration and repeated public announcement in the German cases. The one group of Justices can hardly fail to proffer to the Japanese an opportunity to argue reviewability which they have consistently announced should be allowed to the Germans. Neither can the other side extend to the Japanese opportunities which they have consistently denied to the Germans. The fact that neither side in good grace can retreat puts to me disagreeable alternatives as to whether I should break the deadlock or permit it to continue.

I do not regard myself as under a legal disqualification in these Japanese cases under the usages as to disqualification which prevail in this Court. While I negotiated the international Charter under which the Nazi war criminals were tried and also represented the United States in that Four-Power trial, the Japanese were not tried under that Charter but under a later and, in respects relevant to the present controversy, a somewhat different charter, promulgated by different authority. Of course, I participated in formulating basic rules on the subject of war crimes. But it is not the custom of this Court that a Justice disqualifies from passing on a particular case because he actively participated as a Senator or Representative in making the law under which it was tried. Nor has it been considered necessary to disqualify himself because he had handled cases which involved the same law or crimes as those involved in the case before him. I have had no participation either in the basic decision to hold war crimes trials in the Orient or as to the manner in which they should be conducted. Nevertheless, I have been so identified with the subject of war crimes that, if it involved my personal preferences alone, I should not sit in this case.

But the issues here are truly great ones. They only involve decision of war crimes issues secondarily, for

primarily the decision will establish or deny that this Court has power to review exercise of military power abroad and the President's conduct of external affairs of our Government. The answer will influence our Nation's reputation for continuity of policy for a long time to come. For these reasons I decided at Saturday's conference to break the tie in the Japanese cases. The horns between which I must choose in the dilemma are such, as I have pointed out, that it is a choice between evils. The reasons which guide me to a choice are these:

If I add my vote to those who favor denying these applications for want of jurisdiction, it is irrevocable. The Japanese will be executed and their partisans will forever point to the dissents of four members of the Court to support their accusation that the United States gave them less than justice. This stain, whether deserved or not, would be impressed upon the record of the United States in Oriental memory. If, however, I vote with those who would grant temporary relief, it may be that fuller argument and hearing will convert one or more of the Justices on one side or the other from the views that have equally divided them in the German cases. In those cases I did not feel at liberty to cast the deciding vote and there was no course to avoid leaving the question unresolved. But here I feel that a tentative assertion of jurisdiction, which four members of the Court believe does not exist, will not be irreparable if they ultimately are right. To let the sentences be executed against the dissent of four members will be irreparably injurious even if they are wrong, and if their minds are open, as it is understood, to further persuasion, I would not want to be responsible for eliminating even a faint chance of avoiding dissents in this matter. Our allies are more likely to understand and to forgive any assertion of excess jurisdiction against this background than our enemies would be to understand

or condone any excess of scruple about jurisdiction to grant them a hearing.

It is fair to counsel to say that I intend to sit and hear argument at the hearing which I am voting to grant. I shall hope not to participate in the final decision but as to that, I reserve full freedom of decision.

For the present, it is enough that I vote with JUSTICES BLACK, DOUGLAS, MURPHY and RUTLEDGE, who have consistently noted their dissent in war crimes cases, for whatever temporary restraints or writs they see fit to grant for the purpose of bringing on any hearings or arguments they want to hear as a basis for reaching their final decision on the merits. Needless to say, in doing this I express neither approval nor disapproval of the course they have taken and intimate no views on the constitutional issues involved. I have thought, however, that a candid disclosure of the considerations which influence me is due, not only to the litigants in these cases and to those in the previous German cases, but in justice to the Court and to myself.

Time is important in these cases. I notified the full Court of my position on December 4, as soon as I knew the positions others took on this case, in order that no delay may be chargeable to my indecisions. I hope these cases will now be set for the earliest possible hearing. I also indulge the hope that argument will produce a majority decision of the Court without further intervention from one who has been so identified with controversial phases of war crimes law that he cannot expect others to consider him as detached and dispassionate on the subject as he thinks himself to be.

No. 13. UNITED STATES *v.* URBUTEIT. Order entered amending notation of dissent to opinion. Notation reported as amended, *ante*, p. 358.

No. 231. UNITED STATES EX REL. HIRSHBERG *v.* MALANAPHY, COMMANDING OFFICER. Cooke substituted as the party respondent.

No. 154, Misc. MCLAURIN *v.* MURRAH ET AL. Motion for leave to withdraw the petition for writ of mandamus granted and the clerk is authorized to return the record to the District Court. *Thurgood Marshall, Amos T. Hall, William R. Ming, Jr., James M. Nabrit, Marian Wynn Perry* and *Frank D. Reeves* for petitioner.

No. 231, Misc. ADCOCK ET AL. *v.* ALBRITTON ET AL. Motion for leave to file petition for writs of injunction and mandamus denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Thurman Arnold* for petitioners.

No. 246, Misc. FOLSOM ET AL. *v.* ALBRITTON ET AL. Motion for leave to file petition for injunction or other extraordinary relief denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Thurman Arnold, Jack Crenshaw, Files Crenshaw* and *James J. Mayfield* for petitioners.

No. 212, Misc. ENGLE *v.* STEWART, WARDEN;
No. 225, Misc. IN RE TRANT; and
No. 230, Misc. SCHUMAN *v.* HEINZE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also No. 263, supra.*)

No. 292. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Julian C. Tepper* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Reported below: 169 F. 2d 856.

No. 299. UNITED STATES *v.* GERLACH LIVE STOCK CO.;
No. 300. UNITED STATES *v.* POTTER;
No. 301. UNITED STATES *v.* ERRECA;
No. 302. UNITED STATES *v.* JAMES J. STEVINSON (A CORPORATION);
No. 303. UNITED STATES *v.* STEVINSON; and
No. 304. UNITED STATES *v.* 3–H SECURITIES CO. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Edward F. Treadwell* and *Reginald S. Laughlin* for respondents. Reported below: 111 Ct. Cl. 1, 89, 76 F. Supp. 87, 99.

No. 313. COMMISSIONER OF INTERNAL REVENUE *v.* CULBERTSON ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Benjamin L. Bird* for respondents. Reported below: 168 F. 2d 979.

No. 355. CALIFORNIA *v.* ZOOK ET AL. Appellate Department of the Superior Court in and for the County of Los Angeles, California. Certiorari granted. *Ray L. Chesebro* and *John L. Bland* for petitioner. *Frank W. Woodhead* for respondents. Reported below: 87 Cal. App. 2d 921, 197 P. 2d 851.

No. 135. UNITED STATES *v.* GRIFFIN ET AL., RECEIVERS; and
No. 198. JONES, RECEIVER, *v.* UNITED STATES. Court of Claims. In No. 135, Jones, present receiver for Georgia & Florida Railroad, substituted as the party respondent. Certiorari granted. *Solicitor General Perlman* for the United States. With him on a memorandum in No. 198 were *Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Liftin. Moultrie Hitt* for respondents in No. 135 and petitioner in No. 198. Reported below: 110 Ct. Cl. 330, 77 F. Supp. 197.

No. 387. TRANSCONTINENTAL & WESTERN AIR, INC. *v.* CIVIL AERONAUTICS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR. JUSTICE REED took no part in the consideration or decision of this application. *Gerald B. Brophy* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 83 U. S. App. D. C. 358, 169 F. 2d 893.

Certiorari Denied.

No. 193. WASHINGTON *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Leon A. Ransom* for petitioner. *Guy E. Williams,* Attorney General of Arkansas, and *Oscar E. Ellis,* Assistant Attorney General, for respondent. Reported below: 213 Ark. 218, 210 S. W. 2d 307.

No. 218. HENDERSON *v.* SHELL OIL CO., INC. ET AL. Supreme Court of Texas. Certiorari denied. *Douglas H. Jones, Douglas L. C. Jones* and *Joe E. Estes* for petitioner. *Geo. W. Cunningham* for the Shell Oil Co.; and *Leslie Humphrey* for Mount, respondents. Reported below: 146 Tex. 467, 208 S. W. 2d 863.

No. 238. ERRECA ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Edward F. Treadwell* and *Reginald S. Laughlin* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States. Reported below: 111 Ct. Cl. 1, 76 F. Supp. 87.

No. 294. DEEB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Fred H. Rees* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Reported below: 169 F. 2d 856.

No. 295. DIGGS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *George Stone* for petitioner. *Eugene F. Black,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, *Daniel J. O'Hara,* Assistant Attorney General, and *H. H. Warner* for respondent. Reported below: 321 Mich. 303, 32 N. W. 2d 728.

No. 332. UNITED STATES *v.* PFOTZER ET AL. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *John W. Gaskins* for respondents. Reported below: 111 Ct. Cl. 184, 77 F. Supp. 390.

No. 335. JOSEPH MARTINELLI & Co., INC. *v.* L. GILLARDE Co. C. A. 1st Cir. Certiorari denied. *Arthur V. Getchell* for petitioner. *Henry J. Stein* for respondent. Reported below: 169 F. 2d 60.

No. 343. UNITED SHOE MACHINERY CORP. *v.* KAMBORIAN ET AL. C. A. 1st Cir. Certiorari denied. *Merwin F. Ashley* for petitioner. *Charles S. Grover* for respondents. Reported below: 169 F. 2d 249.

No. 347. RAINEY *v.* CARTLIDGE ET AL. C. A. 5th Cir. Certiorari denied. *Duke Duvall* for petitioner. Reported below: 168 F. 2d 841.

Nos. 352 and 353. KENT FOOD CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioners. *Solicitor General Perlman* and *Robert S. Erdahl* for the United States. Reported below: 168 F. 2d 632.

No. 356. CENTURY INDEMNITY Co. *v.* ROSENBAUM, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 2d Cir. Certiorari denied. *Samuel Gottesman* for petitioner. *Chaun-*

cey H. Levy and *Sidney Basil Levy* for Rosenbaum, Trustee in Bankruptcy, respondent. Reported below: 168 F. 2d 917.

No. 359. DELOZIER *v.* THOMPSON, TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. *Leon B. Catlett* for petitioner. Reported below: See 167 F. 2d 626.

No. 364. FLISS ET AL. *v.* WOODS, ACTING HOUSING EXPEDITER. C. A. 7th Cir. Certiorari denied. *Vernon Tittle* for petitioners. Reported below: 168 F. 2d 612.

No. 367. JARRETT ET AL. *v.* NORFOLK REDEVELOPMENT & HOUSING AUTHORITY. C. A. 4th Cir. Certiorari denied. *Louis B. Fine* for petitioners. *Edward R. Baird* and *George M. Lanning* for respondent. Reported below: 169 F. 2d 409.

No. 368. BRATT ET AL. *v.* WESTERN AIR LINES, INC. C. A. 10th Cir. Certiorari denied. *William H. DeParcq* and *Parnell Black* for petitioners. *Arthur E. Moreton* for respondent. Reported below: 169 F. 2d 214.

No. 187. WATCHTOWER BIBLE & TRACT SOCIETY, INC. ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. Supreme Court of New York, New York County. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY are of opinion the petition should be granted. *Hayden C. Covington* and *Grover C. Powell* for petitioners. *Stuart N. Updike* and *James W. Rodgers* for respondent. Reported below: See 297 N. Y. 339, 79 N. E. 2d 433.

No. 317. BENZIAN *v.* GODWIN ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

David Mackay and *Sidney A. Diamond* for petitioner. *Solicitor General Perlman* for respondents. Reported below: 168 F. 2d 952.

No. 320. BATTAGLIA ET AL. *v.* GENERAL MOTORS CORP.;
No. 321. HOLLAND ET AL. *v.* GENERAL MOTORS CORP.;
No. 322. HILGER ET AL. *v.* GENERAL MOTORS CORP.; and
No. 323. CASHEBA *v.* GENERAL MOTORS CORP. C. A. 2d Cir. Certiorari denied. *Manly Fleischmann* and *David Diamond* for petitioners. *Henry M. Hogan* and *Nicholas J. Rosiello* for respondent. *Charles J. Margiotti* filed a brief for Thomas et al., as *amici curiae*, supporting the petition. Reported below: 169 F. 2d 254.

No. 331. WOODMANSEE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Thomas J. Riordan* for petitioner. Reported below: 32 Cal. 2d 105, 194 P. 2d 681.

No. 434. ADCOCK ET AL. *v.* ALBRITTON ET AL. Supreme Court of Alabama. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Thurman Arnold* for petitioners.

No. 134, Misc. TRAHAN *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. Reported below: 214 La. 100, 36 So. 2d 652.

No. 170, Misc. BUTLER *v.* NIERSTHEIMER, WARDEN. Circuit Court of Hancock County, Illinois. Certiorari denied.

No. 176, Misc. MURPHY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 198, Misc. WHITE *v.* NIERSTHEIMER, WARDEN. City Court of the City of East St. Louis, Illinois. Certiorari denied.

No. 199, Misc. BAILEY *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 200, Misc. SELLERS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 213, Misc. HIRSCH *v.* NEW YORK. Court of General Sessions, New York County, Part VIII, New York. Certiorari denied.

No. 214, Misc. SHOTKIN *v.* PERKINS ET AL. Supreme Court of Colorado. Certiorari denied. Reported below: See 118 Colo. 584, 199 P. 2d 295.

No. 217, Misc. NEW *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 219, Misc. SHOTKIN *v.* BURKE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 170 F. 2d 368.

Rehearing Denied.

No. 211. KELLEY *v.* UNION TANK & SUPPLY CO., *ante*, p. 827. Motion for leave to file petition for rehearing denied.

No. 288. STRAUSS *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 858. Rehearing denied.

DECEMBER 8, 1948.

Miscellaneous Order.

No. 258, Misc. WHEELER ET AL. *v.* REID, SUPERINTENDENT. Motion for leave to file petition for writ of certiorari denied. *James J. Laughlin* for petitioner.

DECEMBER 9, 1948.

Miscellaneous Order.

No. 260, Misc. WHEELER *v.* CLEMMER. Motion for leave to file petition for writ of habeas corpus denied, and motion for stay of execution also denied.

DECEMBER 13, 1948.

Per Curiam Decisions.

No. 414. RING ET AL., TRADING AS R. & B. TRUCK & PARTS CO., *v.* MAYOR AND COUNCIL OF THE BOROUGH OF NORTH ARLINGTON. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Abraham Alboum* for appellants. Reported below: 1 N. J. 24, 61 A. 2d 508.

No. 433. HODGE ET AL. *v.* TULSA COUNTY ELECTION BOARD ET AL. Appeal from the United States District Court for the Northern District of Oklahoma. *Per Curiam:* The judgment is vacated and the case is remanded with directions to dismiss the cause as moot. *Mills* v. *Green,* 159 U. S. 651; *United States* v. *Anchor Coal Co.,* 279 U. S. 812. *Amos T. Hall* for appellants. Reported below: —— F. Supp. ——.

No. 86, Misc. ROBERTS *v.* MEMPHIS STREET RAILWAY CO. On petition for writ of certiorari to the United

States Court of Appeals for the Sixth Circuit. *Per Curiam:* Petition for writ of certiorari granted. The order of the Court of Appeals is vacated and the case is remanded to that court for further consideration in the light of the opinion of this Court in *Adkins* v. *DuPont de Nemours & Co., ante,* p. 331. *Grover N. McCormick* for petitioner. *Roane Waring* and *Sam P. Walker* for respondent.

Miscellaneous Orders.

No. 178, Misc. WATERMAN *v.* SANBORN, ACTING WARDEN;

No. 226, Misc. BURALL *v.* SWOPE, WARDEN;

No. 228, Misc. BAUTZ *v.* RAGEN, WARDEN; and

No. 236, Misc. CANNADY *v.* RAGEN, WARDEN. The motions for leave to file petitions for writs of habeas corpus are severally denied.

Certiorari Granted. (*See also No. 86, Misc., supra.*)

No. 272. TERMINIELLO *v.* CHICAGO. Supreme Court of Illinois. Certiorari granted. *Albert W. Dilling* for petitioner. *Joseph F. Grossman* for respondent. Reported below: 400 Ill. 23, 79 N. E. 2d 39.

No. 396. MORGANTOWN *v.* ROYAL INSURANCE CO., LTD. C. A. 4th Cir. Certiorari granted. *W. G. Stathers* for petitioner. *James M. Guiher* for respondent. Reported below: 169 F. 2d 713.

No. 121, Misc. TAYLOR *v.* DENNIS, WARDEN. Motion for leave to file petition for writ of certiorari granted. Petition for writ of certiorari granted. MR. JUSTICE BLACK took no part in the consideration or decision of these applications. *Nesbitt Elmore, Thurgood Marshall, Marian Wynn Perry* and *Frank D. Reeves* for petitioner.

A. A. Carmichael, Attorney General of Alabama, *Bernard F. Sykes* and *James L. Screws,* Assistant Attorneys General, for respondent.

Certiorari Denied.

No. 242. MAMLIN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Kester Walton* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Liftin* for the United States. Reported below: 111 Ct. Cl. 596, 77 F. Supp. 930.

No. 370. SOUTHWESTERN GREYHOUND LINES, INC. ET AL. *v.* KING. C. A. 10th Cir. Certiorari denied. *Earl Pruet* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Liftin* for respondent. Reported below: 169 F. 2d 497.

No. 371. KIVO ET AL., DOING BUSINESS AS JOHN KIVO & Co., *v.* LOEB. C. A. 2d Cir. Certiorari denied. *Allan R. Campbell* for petitioners. *Aloysius C. Falussy* for respondent. Reported below: 169 F. 2d 346.

No. 372. LEISHMAN *v.* RADIO CONDENSER CO. ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Leonard S. Lyon* and *Maxwell James* for respondents. Reported below: 167 F. 2d 890.

No. 398. TREASURE COMPANY ET AL. *v.* UNITED STATES, FOR THE USE OF RECONSTRUCTION FINANCE CORPORATION. C. A. 9th Cir. Certiorari denied. *Henry G. Bodkin, George M. Breslin* and *Michael G. Luddy* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States. Reported below: 169 F. 2d 437.

No. 373. WHITNEY *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 374. ALEXANDER *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 375. ANDERSON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 376. ATKIN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 377. DAVISON *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 378. DICKEY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 379. LAMONT *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 380. ESTATE OF LAMONT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 381. LEFFINGWELL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 382. MITCHELL *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 383. ESTATE OF MORGAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 384. MORGAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 385. ESTATE OF BARTOW ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *John W. Davis* and *Montgomery B. Angell* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Hilbert P. Zarky* for respondent. Reported below: 169 F. 2d 562.

No. 394. FILBEN MANUFACTURING CO., INC. ET AL. *v.* ROCK-OLA MANUFACTURING CORP. ET AL. C. A. 8th Cir. Certiorari denied. *Max Swiren* and *Ben W. Heineman* for petitioners. *Thomas H. Sheridan* for respondents. Reported below: 168 F. 2d 919.

No. 172, Misc. MAY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 177, Misc. JACKSON *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 204, Misc. CROMBIE *v.* NIERSTHEIMER, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 207, Misc. COLLINS *v.* CIRCUIT COURT OF WILL COUNTY ET AL. Circuit Court of Will County and the Criminal Court of Cook County, Illinois. Certiorari denied.

No. 208, Misc. BATES *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 209, Misc. MCNAUGHTON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 210, Misc. LANE *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 215, Misc. MCKAY *v.* ADERHOLD ET AL., WARDENS. Supreme Court of Georgia. Certiorari denied. *James A. Belflower* for petitioner. Reported below: See 203 Ga. 790, 48 S. E. 2d 453.

No. 216, Misc. CUNDIFF *v.* NIERSTHEIMER, WARDEN. Circuit Court of Sangamon County, Illinois. Certiorari denied.

No. 220, Misc. CUNNINGHAM *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

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No. 222, Misc. NICHOLS *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 223, Misc. STORY *v.* BURFORD, WARDEN. District Court of Bryan County, Oklahoma. Certiorari denied.

No. 224, Misc. GOULD *v.* NEW YORK. Supreme Court of New York, First Department. Certiorari denied. Petitioner *pro se*. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Irving I. Waxman,* Assistant Attorney General, for respondent.

No. 243, Misc. BALDRIDGE *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

Rehearing Denied.

No. 697, October Term, 1947. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP., 334 U. S. 827. Motion for leave to file a fourth petition for rehearing denied.

No. 344. KESSLER *v.* MCGLONE, EXECUTOR, ET AL., *ante,* p. 860. Rehearing denied.

No. 42, Misc. EATON *v.* RAGEN, WARDEN, *ante,* p. 832. Second petition for rehearing denied.

No. 73, Misc. ROBERTS *v.* CALIFORNIA, *ante,* p. 847. Rehearing denied.

No. 153, Misc. SMITH *v.* HOWARD, WARDEN, *ante,* p. 856. Rehearing denied.

Order Appointing Counsel.

No. 418. GIBBS *v.* BURKE, WARDEN. Certiorari, 335 U. S. 867, to the Supreme Court of Pennsylvania. It is ordered that Frederick Bernays Wiener, Esq., of Washington, D. C., a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

DECEMBER 20, 1948.

Per Curiam Decision.

No. 59. MARZANI *v.* UNITED STATES. Certiorari, 334 U. S. 858, to the United States Court of Appeals for the District of Columbia Circuit. Argued December 8, 9, 1948. Decided December 20, 1948. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Osmond K. Fraenkel* and *Allan R. Rosenberg* argued the cause and filed a brief for petitioner. *Solicitor General Perlman* argued the cause for the United States. With him on the brief were *Robert S. Erdahl* and *Irving S. Shapiro*. *Belford V. Lawson, Jr.* filed a brief for the National Lawyers Guild, as *amicus curiae,* urging reversal. Reported below: 83 U. S. App. D. C. 78, 86, 168 F. 2d 133, 141.

Final Order and Decree.

No. 10, Original. UNITED STATES *v.* WYOMING ET AL.

FINAL ORDER

Pursuant to the decision of this Court in *United States* v. *Wyoming,* 331 U. S. 440, a decree was entered on February 16, 1948, 333 U. S. 834.

By the terms of the decree, which adjudged that title to the land in question is in the United States, jurisdiction was retained by this Court for the purpose of deter-

mining the amount of damages payable by defendants to the plaintiff, and for such other and further orders and decrees as may be necessary.

On July 2, 1948, Public Law 887 (Ch. 815, 62 Stat. 1233) was approved, and provided:

"That the Secretary of the Interior be, and he is hereby authorized and directed to issue a patent to the State of Wyoming for the east half of the northeast quarter, section 36, township 58 north, range 100 west, of the sixth principal meridian, in Park County, Wyoming, subject to any existing lease or leases: *Provided,* That title to said land shall be held and considered to have been vested in the State of Wyoming on July 10, 1890."

On September 29, 1948, the Secretary of the Interior, pursuant to the authorization and direction contained in the aforesaid Act of Congress, issued United States Patent No. 1,123,916 to the State of Wyoming for the portion of Section 36 described in said Act, subject to any existing lease or leases, with the title thereto considered to have vested in the State of Wyoming on July 10, 1890.

The claim for damages arose entirely from the possession by the defendant Ohio Oil Company of the land described in said Act of Congress, and its extraction of oil therefrom. Inasmuch as the patent issued by the United States vests title to said land in the State of Wyoming during the entire period of possession by the defendant Ohio Oil Company, there is no need or requirement for further consideration by the Court of plaintiff's demand for a money judgment.

It is therefore ORDERED AND DECREED that the defendants shall pay the costs of this proceeding, including compensation for services rendered and actual expenses incurred by the Honorable Nat U. Brown, Special Master herein. Such compensation and expenses will be fixed by an order of the Court.

Miscellaneous Orders.

No. 12, Original. UNITED STATES *v.* CALIFORNIA. The motion of the complainant for clarification of scope of inquiry referred to the Special Master is denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 206, Misc. EX PARTE COLLETT. This case is assigned for hearing on the motion for leave to file petition for writs of mandamus and prohibition. *Theodore Granik* for petitioner.

No. 233, Misc. KILPATRICK *v.* TEXAS & PACIFIC RAILWAY CO. This case is assigned for hearing on the motion for leave to file petition for writ of mandamus or certiorari. *William H. DeParcq, Gerald F. Finley* and *Arnold B. Elkind* for petitioner. *Theodore Kiendl, William H. Timbers* and *Cleveland C. Cory* for respondent.

No. 269, Misc. UNITED STATES *v.* NATIONAL CITY LINES, INC. ET AL. This case is assigned for hearing on the motion for leave to file petition for writ of certiorari. *George T. Washington,* then Acting Solicitor General, for the United States. *Marland Gale, C. Frank Reavis* and *Martin D. Jacobs* for respondents.

No. —. WEBER *v.* ILLINOIS. Motion for stay of execution denied.

No. 237, Misc. WILLIAMS *v.* UNITED MINE WORKERS OF AMERICA. Motion for leave to file petition for writ of certiorari denied.

No. 238, Misc. RUSSO *v.* THOMPSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 242, Misc. FRASER *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

No. 267, Misc. KIMURA ET AL. *v.* MACARTHUR ET AL. The motions are denied. See the opinion announced today in *Hirota* v. *MacArthur,* 338 U. S. 197.* *John W. Crandall, William Logan, Jr., Ben Bruce Blakeney, John G. Brannon* and *George Yamaoka* for petitioners.

Certiorari Denied.

No. 361. MASTER METAL STRIP SERVICE, INC. ET AL. *v.* PROTEX WEATHERSTRIP MFG. CO. ET AL. C. A. 7th Cir. Certiorari denied. *Clarence E. Threedy* for petitioners. *Charles B. Cannon* for respondents. Reported below: 169 F. 2d 700.

No. 392. MCCOY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Wellington D. Rankin* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 169 F. 2d 776.

No. 401. CITY BANK FARMERS TRUST CO., ANCILLARY EXECUTOR, *v.* PEDRICK, COLLECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Charles Angulo* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *L. W. Post* for respondent. Reported below: 168 F. 2d 618.

No. 407. WIDENHOUSE, TRADING AS CAROLINA OIL CO., *v.* WAR EMERGENCY CO-OPERATIVE ASSOCIATION. C. A. 4th Cir. Certiorari denied. *Luther T. Hartsell, Jr.* for petitioner. *Frank Thomas Miller, Jr.* for respondent. Reported below: 169 F. 2d 403.

No. 408. ABRAHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Louis M. Hopping* for petitioner.

*[The reporting of the opinion of the Court in this case was delayed pending announcement of the opinion of MR. JUSTICE DOUGLAS, which was announced on June 27, 1949.]

Solicitor General Perlman, Robert S. Erdahl and *Harold D. Cohen* for the United States.

No. 410. TRICO PRODUCTS CORP. *v.* McGOWAN, COLLECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Bruce Bromley, Fred W. Morrison* and *Richard T. Davis* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Homer R. Miller* for petitioner. Reported below: 169 F. 2d 343.

No. 399. DAVIDSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Maurice Edelbaum* for petitioner. Reported below: See 297 N. Y. 894, 79 N. E. 2d 737.

No. 187, Misc. BONDS *v.* SHERBURNE MERCANTILE CO. ET AL. C. A. 9th Cir. Certiorari denied. *Kenneth L. Kimble* for petitioner. *John C. Hauck* for respondents. Reported below: 169 F. 2d 433.

No. 232, Misc. ANDERSON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 241, Misc. RODRIQUEZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 268, Misc. WEBER *v.* RAGEN, WARDEN. Circuit Court of Peoria County, Illinois. Certiorari denied.

Rehearing Denied.

No. 535, October Term, 1947. JOSEPHSON *v.* UNITED STATES, 333 U. S. 838. Motion for leave to file a second petition for rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 6. GRAND RIVER DAM AUTHORITY *v.* GRAND-HYDRO, 335 U. S. 359. Rehearing denied.

No. 30. KORDEL *v.* UNITED STATES, 335 U. S. 345. The petition for rehearing is denied for the reason that it was not filed within the time provided by Rule 33.

No. 148, Misc. THIEL *v.* SOUTHERN PACIFIC CO., 335 U. S. 872. Rehearing denied.

No. 164, Misc. PRYOR *v.* CALIFORNIA, 335 U. S. 863. Rehearing denied.

DECEMBER 29, 1948.

Certiorari Denied.

No. 290, Misc. MEHAFFEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 32 Cal. 2d 535, 197 P. 2d 12.

JANUARY 3, 1949.

Per Curiam Decision.

No. 413. GEORGIA RAIL ROAD & BANKING CO. *v.* MUSGROVE, STATE REVENUE COMMISSIONER. Appeal from the Supreme Court of Georgia. *Per Curiam:* Redwine substituted for Musgrove as appellee. The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. MR. JUSTICE JACKSON is of the opinion that probable jurisdiction should be noted. *James E. Harper, W. Inman Curry* and *Rembert Marshall* for appellant. *Eugene Cook,* Attorney General of Georgia, *Claude Shaw,* Deputy Assistant Attorney General, and *Victor Davidson* for appellee. Reported below: 204 Ga. 139, 49 S. E. 2d 26.

Miscellaneous Orders.

No. —, Original. UNITED STATES *v.* TEXAS; and

No. —, Original. UNITED STATES *v.* LOUISIANA. The motions of the defendants for leave to oppose the motions for leave to file complaints are granted, and leave is granted to file objections, based upon jurisdictional grounds, within two weeks.

No. 171, Misc. KISSINGER *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States.

No. 250, Misc. BAXTER *v.* RAGEN, WARDEN; and

No. 264, Misc. REID *v.* RAGEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 279, Misc. EX PARTE LOUISIANA FARMERS PROTECTIVE UNION, INC. Motion for rule nisi and for leave to file petition for writ of mandamus denied. *Cameron C. McCann, James H. Morrison, Edward R. Schowalter* and *K. K. Kennedy* for petitioner.

Certiorari Granted.

No. 388. BROOKS *v.* UNITED STATES; and

No. 389. BROOKS, ADMINISTRATOR, *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. *Whiteford S. Blakeney* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 169 F. 2d 840.

No. 406. UNITED STATES *v.* KNIGHT. C. A. 3d Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Robert T. McCracken, George G. Chandler* and *J. Julius Levy* for respondent. Reported below: 169 F. 2d 1001.

No. 390. PROPPER, RECEIVER, *v.* CLARK, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 2d Cir. Certiorari granted limited to questions 1 and 2 presented by the petition for the writ, *i. e.:* (1) Did petitioner's appointment as temporary statutory receiver, on June 12, 1941, endow him with title by operation of law to the debt in question which was good as against the Custodian's subsequent Vesting Order? and (2) If not, did the September 29, 1941, judgment appointing petitioner permanent statutory receiver endow him with title to the debt in question as of the date of his appointment as temporary statutory receiver which was good as against the subsequent Vesting Order? THE CHIEF JUSTICE took no part in the consideration or decision of this application. *A. Walter Socolow* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bazelon* and *James L. Morrisson* for respondent. Reported below: 169 F. 2d 324.

Certiorari Denied.

No. 365. FISCH ET AL. *v.* GENERAL MOTORS CORP.; and

No. 366. BATEMAN ET AL. *v.* FORD MOTOR CO. C. A. 6th Cir. Certiorari denied. *Ernest Goodman, Jack N. Tucker, Morton A. Eden* and *George W. Crockett, Jr.* for petitioners in Nos. 365 and 366, and *Edward Lamb* was also for petitioners in No. 366. *Henry M. Hogan* and *Nicholas J. Rosiello* for respondent in No. 365. *Rockwell T. Gust* and *William T. Gossett* for respondent in No. 366. Reported below: 169 F. 2d 266.

No. 395. CONSUMERS CO. *v.* CONSUMERS PETROLEUM CO; and

No. 425. CONSUMERS PETROLEUM CO. *v.* CONSUMERS CO. C. A. 7th Cir. Certiorari denied. *Joseph B. Fleming* for the Consumers Co. *Albert E. Jenner, Jr., Harry*

G. Hershenson and *James B. McKeon* for the Consumers Petroleum Co. Reported below: 169 F. 2d 153.

No. 403. ESTATE OF ZELLERBACH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Philip S. Ehrlich* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Helen Goodner* for respondent. Reported below: 169 F. 2d 275.

Nos. 419 and 420. BEELER *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. C. A. 10th Cir. Certiorari denied. *Claude E. Sowers* for petitioner. *W. F. Peter* for respondent. Reported below: 169 F. 2d 557.

No. 421. BRADHAM ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *W. F. Semple* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 168 F. 2d 905.

Nos. 423 and 424. BERNHARDT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *George S. Fitzgerald* and *Paul B. Mayrand* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 169 F. 2d 983.

No. 179, Misc. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States.

No. 180, Misc. CLARK *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied. *James S. Redmond* for petitioner.

No. 193, Misc. HALEY *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Francis Fisher Kane* for petitioner.

No. 194, Misc. ELLARD *v.* NEW HAMPSHIRE. Supreme Court of New Hampshire. Certiorari denied. *Jonathan Piper* for petitioner. *Ernest R. D'Amours,* Attorney General of New Hampshire, for respondent. Reported below: 95 N. H. 217, 60 A. 2d 461.

No. 227, Misc. BRITE ET AL. *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 251, Misc. FOLEY *v.* RAGEN, WARDEN. Circuit Court of Sangamon County, Illinois. Certiorari denied.

No. 252, Misc. TIPESCU *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 253, Misc. BERRY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *John R. Parkhill* for petitioner. Reported below: 160 Fla. 834, 36 So. 2d 784.

No. 254, Misc. FARMER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 255, Misc. HATHAWAY *v.* NIERSTHEIMER, WARDEN. Circuit Court of Alexander County, Illinois. Certiorari denied.

No. 256, Misc. MILBURN *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 401 Ill. 465, 82 N. E. 2d 438.

No. 261, Misc. DZAN *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 263, Misc. HALVERSON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 266, Misc. GREEN *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 270, Misc. STERBA *v.* NIERSTHEIMER, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 272, Misc. JACKSON *v.* GEORGIA. Court of Appeals of Georgia. Certiorari denied. *W. A. Bootle* for petitioner. Reported below: 77 Ga. App. 635, 49 S. E. 2d 198.

No. 273, Misc. BOUGH *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 274, Misc. HOUGHTON *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 165 Kan. 619, 197 P. 2d 941.

Rehearing Denied.

No. 69. J. H. ALLISON & Co. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 814; and

No. 202. ECONOMOS *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 826. Motions for leave to file petitions for rehearing denied.

No. 295. DIGGS *v.* MICHIGAN, *ante*, p. 885. Rehearing denied.

No. 362. MASICH *v.* UNITED STATES SMELTING, REFINING & MINING CO. ET AL., *ante*, p. 866. Rehearing denied.

No. 393. WISNER *v.* KAMINSKI, *ante*, p. 875. Bryan substituted for Wisner as appellant. Rehearing denied.

No. 240, Misc. DOHIHARA *v.* MACARTHUR ET AL., 338 U. S. 197; and

No. 248, Misc. KIDO ET AL. *v.* MACARTHUR ET AL., 338 U. S. 197. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

JANUARY 10, 1949.

Per Curiam Decisions.

No. 191. SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES ET AL. *v.* LILLEFLOREN ET AL. Certiorari, *ante,* p. 811, to the Supreme Court of California. Argued January 5, 1949. Decided January 10, 1949. *Per Curiam:* It appearing that there is a non-federal ground, independent of the federal ground, and adequate to support the judgment of the lower court, the case is dismissed for want of jurisdiction. *Fox Film Corp.* v. *Muller,* 296 U. S. 207; *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52. *Russell E. Parsons* argued the cause for petitioners. With him on the brief was *Harold W. Kennedy. Herbert S. Thatcher* and *David Sokol* argued the cause for respondents. With *Mr. Thatcher* on the brief were *Henry G. Bodkin, J. Albert Woll* and *James A. Glenn* for Lillefloren et al., respondents; and *Mr. Sokol* filed a brief for Sylvane et al., respondents. *John C. Stevenson* and *Mathew O. Tobriner* filed a brief for the California State Federation of Labor, as *amicus curiae,* urging that the case be dismissed. Reported below: 31 Cal. 2d 439, 189 P. 2d 265.

No. 455. CORNELIUS *v.* JACKSON. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Francis Stewart* for appellant.

Miscellaneous Orders.

No. 270. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS (A. F. L.) LOCAL UNION No. 667 ET AL. *v.* MASCARI ET AL. Petition for writ of certiorari to the Supreme Court of Tennessee dismissed on motion of counsel for the petitioners. *Herbert S. Thatcher* and *Grover N. McCormick* for petitioners. *William F. Barry* for respondents. 187 Tenn. 345, 215 S. W. 2d 779.

No. 284, Misc. KELLY *v.* HOWARD, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 317, Misc. WINSTON ET AL. *v.* KNOX, CHIEF JUDGE, ET AL. Motion for leave to file petition to void indictments and to quash venire of petit jurors, for a rule to show cause why mandamus and prohibition should not issue, for rule absolute, and for a stay, denied. *Charles H. Houston, Richard Gladstein, Harry Sacher, Abraham J. Isserman* and *George W. Crockett, Jr.* for petitioners.

Certiorari Granted.

No. 427. WADE *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari granted. *Harry W. Colmery* for petitioner. *Solicitor General Perlman, Robert S. Erdahl, John R. Benney* and *Harold D. Cohen* for respondent. Reported below: 169 F. 2d 973.

Certiorari Denied.

No. 357. NATIONAL BANK OF COMMERCE OF SAN ANTONIO, EXECUTOR, *v.* SCOFIELD, COLLECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *William Robert Smith, Jr.* for petitioner. *Solicitor General Perl-*

man, Assistant Attorney General Caudle, Ellis N. Slack, Harry Baum and *Louise Foster* for respondent. Reported below: 169 F. 2d 145.

No. 405. GUGGENHEIM *v.* UNITED STATES. Court of Claims. Certiorari denied. *Errett G. Smith* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee Jackson* for the United States. Reported below: 111 Ct. Cl. 165, 77 F. Supp. 186.

No. 409. RIELY ET AL., RECEIVERS, *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Eugene Untermyer* and *Robert T. Barton, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Irving I. Axelrad* for the United States. Reported below: 169 F. 2d 542.

No. 411. DAGGS *v.* KLEIN, REAR ADMIRAL, U. S. NAVY, ET AL.; and

No. 412. BRAITO *v.* KLEIN, REAR ADMIRAL, U. S. NAVY, ET AL. C. A. 9th Cir. Certiorari denied. *Herbert Resner* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Oscar H. Davis* and *John R. Benney* for respondents. Reported below: 169 F. 2d 174.

No. 415. FOREMAN'S ASSOCIATION OF AMERICA *v.* EDWARD G. BUDD MANUFACTURING CO. ET AL. C. A. 6th Cir. Certiorari denied. *Walter M. Nelson* and *Allan R. Rosenberg* for petitioner. *Solicitor General Perlman, David P. Findling* and *Ruth Weyand* for the National Labor Relations Board; and *Archibald Broomfield* for the Edward G. Budd Manufacturing Co., respondents. Reported below: 169 F. 2d 571.

No. 428. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *B. D. Murphy* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Reported below: 170 F. 2d 319.

No. 437. MILES ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Louis M. Hopping* for petitioners. *Solicitor General Perlman* and *Robert S. Erdahl* for the United States. Reported below: 170 F. 2d 151.

No. 503. FOSTER ET AL. *v.* MEDINA. C. A. 2d Cir. Certiorari denied. Motion for a stay also denied. *Charles H. Houston, Richard Gladstein, Harry Sacher, Abraham J. Isserman* and *George W. Crockett, Jr.* for petitioners. Reported below: 170 F. 2d 632.

No. 54, Misc. GARITY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 282, Misc. PEAKER *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. Rep. ——, 194 P. 2d 893.

No. 286, Misc. WILSON *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

Rehearing Denied.

No. 98, Misc. DONNELL *v.* MISSOURI, *ante,* p. 862. Motion for leave to file petition for rehearing denied.

No. 214, Misc. SHOTKIN *v.* PERKINS ET AL., *ante,* p. 888. Rehearing denied.

No. 219, Misc. SHOTKIN *v.* BURKE ET AL., *ante,* p. 888. Rehearing denied.

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JANUARY 17, 1949.

Miscellaneous Orders.

No. 279, Misc. EX PARTE LOUISIANA FARMERS PROTECTIVE UNION, INC. Motion for an extension of time within which to file petition for rehearing denied.

No. 2, October Term, 1941. BERNARDS ET AL. *v.* JOHNSON ET AL. Motion to recall the mandate denied.

No. 285, Misc. PARDEE *v.* MICHIGAN; and
No. 299, Misc. MCCRAY *v.* WRIGHT, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 310, Misc. PORESKY *v.* KING; and
No. 312, Misc. LOWE *v.* KILLINGER. Applications denied.

Certiorari Granted.

No. 431. UNITED STEELWORKERS OF AMERICA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari granted. *Arthur J. Goldberg, Frank Donner* and *Thomas E. Harris* for petitioners. *Solicitor General Perlman* for respondent. Reported below: 170 F. 2d 247.

Certiorari Denied.

No. 386. CLARK, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* MANUFACTURERS TRUST CO.; and
No. 443. MANUFACTURERS TRUST CO. *v.* CLARK, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 2d Cir. Certiorari denied. *Solicitor General Perlman* for petitioner in No. 386. *Leonard G. Bisco* for the Manufacturers Trust Co., petitioner in No.

443 and respondent in No. 386. *Solicitor General Perlman, Assistant Attorney General Bazelon, James L. Morrisson, Joseph W. Bishop, Jr.* and *Philip Elman* for respondent in No. 443. Reported below: 169 F. 2d 932.

No. 426. WORLD PUBLISHING CO. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Morrison Shafroth, W. W. Grant, Henry W. Toll* and *Douglas McHendrie* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Melva M. Graney* for the United States. Reported below: 169 F. 2d 186.

No. 432. SWALLEY *v.* ADDRESSOGRAPH-MULTIGRAPH CORP. C. A. 7th Cir. Certiorari denied. *Douglas Arant* for petitioner. *Philip M. Aitken* for respondent. Reported below: 168 F. 2d 585.

No. 444. PUEBLO TRADING CO. *v.* EL CAMINO IRRIGATION DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. *W. Coburn Cook* for petitioner. *Stephen W. Downey* for respondents. Reported below: 169 F. 2d 312.

No. 449. BORG-WARNER CORP. ET AL. *v.* GOODWIN. C. A. 6th Cir. Certiorari denied. *Benton Baker, Max W. Zabel* and *Edward C. Gritzbaugh* for petitioners. *Raymond L. Greist* for respondent.

No. 451. BOWCOTT ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Claude U. Stone* for petitioners. *Solicitor General Perlman* and *Robert S. Erdahl* for the United States. Reported below: 170 F. 2d 173.

No. 461. MONAGAS Y DE LA ROSA ET AL. *v.* VIDAL-GARRASTAZU. C. A. 1st Cir. Certiorari denied. *José A.*

Poventud for petitioners. *James R. Beverley* for respondent. Reported below: 170 F. 2d 99.

Nos. 439 and 440. UNIVERSAL OIL PRODUCTS CO. *v.* WILLIAM WHITMAN CO., INC.; and

No. 441. AMERICAN SAFETY TABLE CO. *v.* SINGER SEWING MACHINE CO. C. A. 3d Cir. Certiorari denied. *Ralph S. Harris, John R. McCullough* and *Adam M. Byrd* for petitioner in Nos. 439 and 440. *Edwin M. Otterbourg, Leon J. Obermayer* and *Charles A. Houston* for petitioner in No. 441. *Leslie Nichols* for the William Whitman Co., respondent in Nos. 439 and 440; and *Newton A. Burgess* and *John F. Ryan* for respondent in No. 441. *Solicitor General Perlman, Assistant Attorney General Morison, Alfred C. Aurich, Paul A. Sweeney* and *Melvin Richter* filed a brief for the United States, as *amicus curiae,* opposing the petitions. Reported below: 169 F. 2d 514.

No. 275, Misc. MARCUS *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 287, Misc. VILES *v.* JOHNSON. Supreme Court of Colorado. Certiorari denied. Reported below: 119 Colo. 10, 199 P. 2d 294.

No. 289, Misc. GALLOWAY *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

Rehearing Denied.

No. 187. WATCHTOWER BIBLE & TRACT SOCIETY, INC. ET AL. *v.* METROPOLITAN LIFE INSURANCE CO., *ante,* p. 886. Rehearing denied.

No. 400. HALL *v.* VIRGINIA, *ante,* p. 875. Rehearing denied.

No. 410. TRICO PRODUCTS CORP. *v.* McGOWAN, COLLECTOR OF INTERNAL REVENUE, *ante*, p. 899. Rehearing denied.

No. 226, Misc. BURALL *v.* SWOPE, WARDEN, *ante*, p. 890. Rehearing denied.

No. 237, Misc. WILLIAMS *v.* UNITED MINE WORKERS OF AMERICA, *ante*, p. 897. Rehearing denied.

AMENDMENT OF RULES.

ORDER.

IT IS ORDERED that the Rules of this Court be amended by adding thereto Rule 38½, to read as follows:

"38½.

"STATE CRIMINAL CASES—TIME FOR TAKING APPEAL OR FILING PETITION FOR WRIT OF CERTIORARI.

"An appeal taken, or petition for writ of certiorari filed, seeking review of a judgment of a state court of last resort in a criminal case, shall be taken or filed within the ninety days prescribed in 28 United States Code, section 2101 (c), Approved June 25, 1948.

"So far as applicable, the general considerations and provisions of Rules 36 and 38 will control in respect to an appeal taken or petition for writ of certiorari filed in a criminal case from a state court of last resort."

NOVEMBER 15, 1948.

AMENDMENTS OF FEDERAL RULES OF CRIMINAL PROCEDURE.

Effective January 1, 1949.

The following order was adopted by the Supreme Court on December 27, 1948:

ORDER.

ORDERED:

1. That the first sentence of Rule 37 (a) (1) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

> (1) *Notice of Appeal.* An appeal permitted by law from a district court to the Supreme Court or to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate.

2. That the first sentence of Rule 38 (a) (3) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

> (3) *Fine.* A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper.

3. That Rule 38 (c) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

> (c) APPLICATION FOR RELIEF PENDING REVIEW. If application is made to a court of appeals or to a circuit judge or to a justice of the Supreme Court for bail pending appeal or for an extension of time for filing the record on appeal or for any other relief which might have been granted by the district court, the application shall be upon notice and shall show

that application to the court below or a judge thereof is not practicable or that application has been made and denied, with the reasons given for the denial, or that the action on the application did not afford the relief to which the applicant considers himself to be entitled.

4. That Rule 39 (b) (2) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

(2) *Use of Typewritten Record.* The court of appeals may dispense with the printing of the record on appeal and review the proceedings on the typewritten record.

5. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on January 1, 1949.

December 27, 1948.

AMENDMENTS TO
RULES OF CIVIL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

To become effective at the time specified in Rule 86 (c)

The following amendments to the Rules of Civil Procedure for the United States District Courts (308 U. S. 645, 329 U. S. 839) were adopted by the Supreme Court of the United States on December 29, 1948, pursuant to the Act of June 25, 1948, 62 Stat. 869, 28 U. S. C. § 2072, by an order published *post,* p. 923. On December 31, 1948, they were transmitted by The Chief Justice to the Attorney General for report to Congress. *Post,* p. 921. On January 3, 1949, they were reported to Congress by the Attorney General. *Post,* p. 922.

Under Rule 86 (c), *post,* p. 942, these amendments are to become effective "on the day following the adjournment of the first regular session of the 81st Congress."

LETTER OF TRANSMITTAL.

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

DECEMBER 31, 1948.

MY DEAR MR. ATTORNEY GENERAL:

By direction of the Supreme Court, I transmit to you herewith amendments of the Rules of Civil Procedure for the United States District Courts, which have been adopted by the Supreme Court pursuant to the Act of June 25, 1948, chapter 646 (62 Stat. 869), (U. S. C. Title 28, § 2072) with the request that these amendments be reported by you to the Congress at the beginning of the regular session on January 3, 1949.

I have the honor to remain,

Respectfully yours,

(Signed) FRED M. VINSON,
Chief Justice of the United States.

Honorable TOM C. CLARK,
Attorney General,
Washington, D. C.

LETTER OF SUBMITTAL.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

JANUARY 3, 1949.

To the Senate and House of Representatives of the United States of America in Congress assembled:

I have the honor to report to the Congress under the Act of June 25, 1948, chapter 646 (62 Stat. 869; Title 28, United States Code, section 2072), at the beginning of a regular session thereof commencing this 3d day of January, 1949, the enclosed amendments to the Rules of Civil Procedure for the District Courts of the United States.

By letter of December 31, 1948, from the Chief Justice of the United States, a copy of which appears as a prefix to the amendments to the Rules transmitted herewith, I am advised that such amendments to the Rules have been adopted by the Supreme Court pursuant to the Act above mentioned, and I am requested by the Supreme Court to report these amendments to the Congress at the beginning of the regular session in January 1949.

Respectfully,

(Signed) TOM C. CLARK,
Attorney General.

ORDER.

ORDERED:

1. That the title "Rules of Civil Procedure for the District Courts of the United States" be amended to read "Rules of Civil Procedure for the United States District Courts".

2. That Rules 1, 17, 22, 24, 25, 27, 37, 45, 57, 60, 62, 65, 66, 67, 69, 72, 73, 74, 75, 76, 79, 81, 82, and 86 of the Rules of Civil Procedure and Forms Nos. 1, 19, 22, 23, and 27, be, and they hereby are, amended as hereinafter set forth.

3. That the Chief Justice be authorized to transmit these amendments to the Attorney General with the request that he report them to the Congress at the beginning of the regular session in January 1949.

DECEMBER 29, 1948.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

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AMENDMENTS TO RULES OF CIVIL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

Rule 1. Scope of Rules.

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 17. Parties Plaintiff and Defendant; Capacity.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U. S. C., §§ 754 and 959 (a).

RULE 22. INTERPLEADER.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C. §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

RULE 24. INTERVENTION.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C., § 2403.

RULE 25. SUBSTITUTION OF PARTIES.

(d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE. When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or

continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

Rule 27. Depositions Before Action or Pending Appeal.

(a) Before Action.

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in

evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 26 (d).

RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

(e) FAILURE TO RESPOND TO LETTERS ROGATORY. A subpoena may be issued as provided in Title 28, U. S. C., § 1783, under the circumstances and conditions therein stated.

RULE 45. SUBPOENA.

(e) SUBPOENA FOR A HEARING OR TRIAL.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C., § 1783.

RULE 57. DECLARATORY JUDGMENTS.

The procedure for obtaining a declaratory judgment pursuant to Title 28, U. S. C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

RULE 60. RELIEF FROM JUDGMENT OR ORDER.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mis-

take, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

(g) POWER OF APPELLATE COURT NOT LIMITED. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Rule 65. Injunctions.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U. S. C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

Rule 66. Receivers Appointed by Federal Courts.

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

Rule 67. Deposit in Court.

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U. S. C., §§ 2041 and 2042; the Act of June 26, 1934, c. 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), U. S. C., Title 31, § 725v; or any like statute.

Rule 69. Execution.

(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U. S. C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, c. 130, § 8 (18 Stat. 401), U. S. C., Title 2, § 118, and when the court has given the certificate of probable cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes.

Rule 72. Appeal from a District Court to the Supreme Court.

When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken, perfected, and prosecuted pursuant to law and the Rules of the Supreme Court of the United States governing such an appeal.

Rule 73. Appeal to a Court of Appeals.

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal

fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

(c) Bond on Appeal. Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

RULE 74. JOINT OR SEVERAL APPEALS TO THE SUPREME COURT OR TO A COURT OF APPEALS; SUMMONS AND SEVERANCE ABOLISHED.

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal.

RULE 75. RECORD ON APPEAL TO A COURT OF APPEALS.

(a) DESIGNATION OF CONTENTS OF RECORD ON APPEAL. Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant.

(b) TRANSCRIPT. If there be designated for inclusion any evidence or proceeding at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file a copy of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. The copy so filed by the appellant shall be available for the use of the other parties. In the event that a copy of the reporter's transcript or of the necessary portions thereof is

already on file, the appellant shall not be required to file an additional copy. When the rules of the court of appeals so require, the appellant shall furnish a second copy of the transcript for use in the appellate court.

(g) Record to be Prepared by Clerk—Necessary Parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification.

(h) Power of Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court,

or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals.

(o) Rule for Transmission of Original Papers. Whenever a court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73 (g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j), (k), (l), (m), and (n) shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies.

Rule 76. Record on Appeal to a Court of Appeals; Agreed Statement.

When the questions presented by an appeal to a court of appeals can be determined without an examination of all the pleadings, evidence, and proceedings in the court

below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the district court and shall then be certified to the appellate court as the record on appeal.

Rule 79. Books and Records Kept by the Clerk and Entries Therein.

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk

shall enter the word "jury" on the folio assigned to that action.

(b) CIVIL JUDGMENTS AND ORDERS. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(d) OTHER BOOKS AND RECORDS OF THE CLERK. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

RULE 81. APPLICABILITY IN GENERAL.

(a) TO WHAT PROCEEDINGS APPLICABLE.

(1) These rules do not apply to proceedings in admiralty. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U. S. C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy proceedings in the United States District Court for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States. The require-

ments of Title 28, U. S. C., § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.

(3) In proceedings under Title 9, U. S. C., relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U. S. C., Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U. S. C., Title 7, § 499g (c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U. S. C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of Commerce; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U. S. C., Title 15, § 715d (c), as extended for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat. 453), as

amended, U. S. C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of October 14, 1940, c. 876, § 338 (54 Stat. 1158), U. S. C., Title 8, § 738, remain in effect.

(c) REMOVED ACTIONS. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition.

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(d) DISTRICT OF COLUMBIA; COURTS AND JUDGES. (Abrogated.)

(e) LAW APPLICABLE. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

RULE 82. JURISDICTION AND VENUE UNAFFECTED.

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

RULE 86. EFFECTIVE DATE.

(c) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on December 29, 1948, and transmitted to the Attorney General on December 31, 1948, shall take effect on the day following the adjournment of the first regular session of the 81st Congress.

APPENDIX OF FORMS

FORM 1. SUMMONS.

United States District Court for the Southern District of New York

CIVIL ACTION, FILE NUMBER .....

A. B., PLAINTIFF
v.
C. D., DEFENDANT
} *Summons*

To the above-named Defendant:

You are hereby summoned and required to serve upon ....., plaintiff's attorney, whose address is ....., an answer to the complaint which is herewith served upon you, within 20[1] days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

....., *Clerk of Court.*

[Seal of the U. S. District Court]
Dated .....

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.)

[1] If the United States or an officer or agency thereof is a defendant, the time to be inserted as to it is 60 days.

FORM 19. MOTION TO DISMISS, PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, OF LACK OF SERVICE OF PROCESS, OF IMPROPER VENUE, AND OF LACK OF JURISDICTION UNDER RULE 12 (b).

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a cor-

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poration organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B, respectively.

3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defendant is a corporation incorporated under the laws of the State of Delaware and is an inhabitant thereof.

4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than three thousand dollars exclusive of interest and costs.

Signed: .....
Attorney for Defendant.
Address: .....

Notice of Motion

To: .....
Attorney for Plaintiff.
.....

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room ....., United States Court House, Foley Square, City of New York, on the ..... day of ....., 19...., at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: .....
Attorney for Defendant.
Address: .....

NOTE

The above motion and notice of motion may be combined and denominated Notice of Motion. See Rule 7 (b).

FORM 22. MOTION TO BRING IN THIRD-PARTY DEFENDANT.

(Form for motion remains unchanged)

Exhibit A

United States District Court for the Southern District of New York

CIVIL ACTION, FILE NUMBER .....

A. B., PLAINTIFF *v.* C. D., DEFENDANT AND THIRD-PARTY PLAINTIFF *v.* E. F., THIRD-PARTY DEFENDANT	*Summons*

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon ...., plaintiff's attorney, whose address is ...., and upon ....., who is attorney for C. D., defendant and third-party plaintiff, and whose address is ....., an answer to the third-party complaint which is herewith served upon you and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you, within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.

....., *Clerk of Court.*

[Seal of District Court]
Dated .....

FORM 23. MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24.

(Based upon the complaint, Form 16)

United States District Court for the Southern District of New York

CIVIL ACTION, FILE NUMBER .....

A. B., PLAINTIFF
v.
C. D., DEFENDANT
E. F., APPLICANT FOR INTERVENTION
} *Motion to intervene as a defendant*

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the manufacturer and vendor to the defendant, as well as to others, of the articles alleged in the complaint to be an infringement of plaintiff's patent, and as such has a defense to plaintiff's claim presenting both questions of law and of fact which are common to the main action.[4]

Signed: .....,
Attorney for E. F., Applicant for Intervention.
Address: .....

Notice of Motion

(Contents the same as in Form 19)

United States District Court for the Southern District of New York

CIVIL ACTION, FILE NUMBER .....

A. B., PLAINTIFF
v.
C. D., DEFENDANT
E. F., INTERVENER
} *Intervener's answer*

First Defense

Intervener admits the allegations stated in paragraphs 1 and 4 of the complaint; denies the allegations in paragraph 3, and denies the allegations in paragraph 2 in so far as they assert the legality of the issuance of the Letters Patent to plaintiff.

[4] For other grounds of intervention, either of right or in the discretion of the court, see Rule 24 (a) and (b).

Second Defense

Plaintiff is not the first inventor of the articles covered by the Letters Patent specified in his complaint, since articles substantially identical in character were previously patented in Letters Patent granted to intervener on January 5, 1920.

Signed: .....,
Attorney for E. F., Intervener.
Address: .....

FORM 27. NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73 (b).

Notice is hereby given that C. D. and E. F., defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit [from the Order (describing it)] [from the final judgment] entered in this action on ....., 19.....

Signed: .....,
Attorney for Appellants C. D. and E. F.
Address: .....

NOTE

Use either the material in the first set of brackets or that in the second, as the case requires. If the appeal is from a part only of an order or judgment that part must be specified.

Rule 73 (b) does not require the appellee to be named. It does require the clerk to notify all other parties than appellant.

AMENDMENTS TO
RULES OF CRIMINAL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

To become effective at the time specified in paragraph 4 of the Order of the Supreme Court adopted December 27, 1948, *post*, p. 953.

The following amendments of the Rules of Criminal Procedure for the United States District Courts (327 U. S. 821) were prescribed by the Supreme Court of the United States pursuant to the Act of June 25, 1948, c. 645, 62 Stat. 683, 18 U. S. C. § 3771. They were transmitted by The Chief Justice to the Attorney General for report to Congress. See letters of transmittal and submittal, *post*, pp. 951, 952.

Under paragraph 4 of the Order of the Supreme Court adopted December 27, 1948, *post*, p. 953, these amendments are to become effective "on the day following the final adjournment of the first regular session of the 81st Congress."

LETTER OF TRANSMITTAL.

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

Chambers of
THE CHIEF JUSTICE

DECEMBER 31, 1948.

My dear MR. ATTORNEY GENERAL:

By direction of the Supreme Court, I transmit to you herewith amendments of the Rules of Criminal Procedure for the United States District Courts, which have been adopted by the Supreme Court, pursuant to the Act of June 25, 1948, chapter 645 (62 Stat. 683), Title 18, U. S. C. § 3771, with the request that these amendments be reported by you to the Congress at the beginning of the regular session on January 3, 1949.

I have the honor to remain,

Respectfully yours,

(Signed) FRED M. VINSON,
Chief Justice of the United States.

Honorable TOM C. CLARK,
Attorney General,
Washington, D. C.

LETTER OF SUBMITTAL.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

JANUARY 3, 1949.

To the Senate and House of Representatives of the United States of America in Congress assembled:

I have the honor to report to the Congress under the Act of June 25, 1948, c. 645 (62 Stat. 683; Title 18, United States Code, section 3771), at the beginning of a regular session thereof commencing this third day of January, 1949, the enclosed amendments to the Rules of Criminal Procedure for the United States District Courts.

By letter of December 31, 1948, from the Chief Justice of the United States, a copy of which appears as a prefix to the amendments to the Rules transmitted herewith, I am advised that such amendments to the Rules have been adopted by the Supreme Court pursuant to the Act above-mentioned and I am requested by the Supreme Court to report these amendments to the Congress at the beginning of the regular session in January, 1949.

There is also transmitted an explanatory statement to accompany the proposed amendments, which statement was received with the letter from the Chief Justice.

Respectfully,

(Signed) TOM C. CLARK,
Attorney General.

ORDER.

ORDERED:

1. That the title of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

Rules of Criminal Procedure for the United States District Courts.

2. That Rules 17 (e) (2), 41 (b) (3), 41 (g), 54 (a) (1), 54 (b), 54 (c), 55, 56, and Rule 57 (a), of the Federal Rules of Criminal Procedure be, and they hereby are, amended as hereinafter set forth.

3. That Forms 1 to 27, inclusive, contained in the Appendix of Forms to the Federal Rules of Criminal Procedure be, and they hereby are, amended as hereinafter specified.

4. That these amendments to the Federal Rules of Criminal Procedure shall take effect on the day following the final adjournment of the first regular session of the 81st Congress.

5. That The Chief Justice be authorized to transmit these amendments to the Attorney General with the request that he report them to the Congress at the beginning of the regular session of the 81st Congress in January, 1949.

DECEMBER 27, 1948.

AMENDMENTS TO RULES OF CRIMINAL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

RULE 17 (e) (2).

(2) *Abroad.* A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C., § 1783.

RULE 41 (b) (3).

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., § 957.

RULE 41 (g).

(g) SCOPE AND DEFINITION. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

RULE 54 (a) (1).

(1) *Courts.* These rules apply to all criminal proceedings in the United States district courts, which include the District Court for the Territory of Alaska and the District Court of the Virgin Islands; in the United States courts of appeals; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

RULE 54 (b).

(b) PROCEEDINGS.

(1) *Removed Proceedings.* These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) *Offenses Outside a District or State.* These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by Title 18, U. S. C., § 3238.

(3) *Peace Bonds.* These rules do not alter the power of judges of the United States or of United States commissioners to hold to security of the peace and for good behavior under Title 18, U. S. C., § 3043, and under Revised Statutes § 4069, 50 U. S. C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) *Trials before Commissioners.* These rules do not apply to proceedings before United States commissioners and in the district courts under Title 18, U. S. C., §§ 3401, 3402, relating to petty offenses on federal reservations.

(5) *Other Proceedings.* These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. They do not apply to proceedings under Title 18, U. S. C., Chapter 403—Juvenile Delinquency—so far as they are inconsistent with that Chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300–4305, 33 U. S. C. §§ 391–396, or to proceedings involving disputes between seamen

under Revised Statutes §§ 4079–4081, as amended, 22 U. S. C. §§ 256–258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325–327, 16 U. S. C. §§ 772–772i, or to proceedings against a witness in a foreign country under Title 28, U. S. C., § 1784.

Rule 54 (c).

(c) Application of Terms. As used in these rules the term "State" includes District of Columbia, territory and insular possession. "Law" includes statutes and judicial decisions. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in a territory or in an insular possession. "District court" includes all district courts named in subdivision (a), paragraph (1) of this rule. "Civil action" refers to a civil action in a district court. "Oath" includes affirmations. "Attorney for the government" means the attorney general, an authorized assistant of the attorney general, a United States attorney and an authorized assistant of a United States attorney. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar," and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

Rule 55. Records.

The clerk of the district court and each United States commissioner shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe.

Rule 56. Courts and Clerks.

The court of appeals and the district court shall be deemed always open for the purpose of filing any proper

paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

Rule 57 (a).

(a) Rules by District Courts and Courts of Appeals. Rules made by district courts and courts of appeals for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court or by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

FORMS.

Forms 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 are amended by striking out "District Court of the United States" in the caption of each form and inserting in lieu thereof "United States District Court."

Form 1 also by striking out "(18 U. S. C. §§ 452, 253)" in the caption of the form and inserting in lieu thereof "(18 U. S. C. §§ 1111, 1114)."

Form 2 also by striking out "(18 U. S. C. §§ 451, 452)" in the caption of the form and inserting in lieu thereof "(18 U. S. C. § 1111)."

Form 3 also by striking out "(Criminal Code § 215, 18 U. S. C. § 338)" in the caption of the form and inserting in lieu thereof "(18 U. S. C. § 1341)."

Form 4 also by striking out "(50 U. S. C. § 103)" in the caption of the form and inserting in lieu thereof "(18 U. S. C. § 2154)."

Form 6 also by striking out "(18 U. S. C. § 408)" in the caption of the form and inserting in lieu thereof "(18 U. S. C. § 2312)."

Form 7 also by striking out "(18 U. S. C. § 408)" in the caption of the form and inserting in lieu thereof "(18 U. S. C. § 2313)."

Form 8 also by striking out "(18 U. S. C. § 76)" in the caption of the form and inserting in lieu thereof "(18 U. S. C. § 912)."

Form 9 also by striking out "(18 U. S. C. § 76)" in the caption of the form and inserting in lieu thereof "(18 U. S. C. § 912)."

Form 10 also by striking out "(18 U. S. C. § 80)" in the caption of the form and inserting in lieu thereof "(18 U. S. C. § 287)."

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Form 15 by striking out "(UNDER 18 U. S. C. § 287)" in the title of the form and inserting in lieu thereof "(UNDER RULE 41)."

Form 17 also by striking out "District Court of the United States" in two places in the body of the form and inserting in lieu thereof in each place "United States District Court."

Form 20 also by striking out "District Court of the United States" in the body of the form and inserting in lieu thereof "United States District Court."

Form 21 also by striking out "District Court of the United States" in the body of the form and inserting in lieu thereof "United States District Court."

Form 26 also by striking out "United States Circuit Court of Appeals" in the body of the form and inserting in lieu thereof "United States Court of Appeals."

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